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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

1111 19TH STREET ASSOCIATES, LIMITED PARTNERSHIP,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

Petition For A Writ of Certiorari
To The District of Columbia Court of Appeals

GILBERT HAHN, JR., ESQ.
JAMES J. GROSS, ESQ.
AMRAM AND HAHN, P.C.
Suite 1100
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 783-3344

Attorneys for Petitioner

TANJA H. CASTRO, ESQ.
AMRAM AND HAHN, P.C.
Suite 1100
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 783-3344

Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the decisions of the courts below arbitrarily and capriciously deprived taxpayer of its Fifth Amendment right to a favorable statutory interpretation of a tax statute susceptible of two meanings.

2. Whether the decisions of the courts below, using equitable principles in interpreting a tax statute, deprived taxpayer of its Fifth Amendment right in an arbitrary and capricious manner.

3. Whether the courts below, in refusing to consider equal protection and due process claims, violated taxpayer's Fifth Amendment rights to a fair hearing in an arbitrary and capricious manner.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	18
CONCLUSION	29

Appendix

Opinion of the Court of Appeals	1a
Order Denying Appellant's Petition for Rehearing or Rehearing en Banc in the Court of Appeals	26a
Opinion and Order of the Superior Court	27a
Order Denying Petitioner's Motion for Reconsideration and Rehearing in the Superior Court	44a
Assessment Record Card	47a
Letter from Gilbert Hahn, Jr. to Robert Klugel Dated November 18, 1981 (Trial Exhibit No. 1)	49a
Petition in the Superior Court	52a
Brief for the Appellant in the Court of Appeals	80a
Appellant's Petition for Rehearing or Rehearing en Banc in Court of Appeals	137a

TABLE OF AUTHORITIES

CASES:	Page
B&M Company v. United States, 452 F.2d 986 (5th Cir. 1972)	20
Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954)	27
Busse v. Commissioner of Internal Revenue, 479 F.2d 1147 (7th Cir. 1973)	20
Crooks v. Harrelson, 282 U.S. 55, 51 S. Ct. 49 (1930)	23
District of Columbia v. Green, 348 A.2d 305 (D.C. 1975)	27
Elgin, J. & E. Ry. Co. v. Barley, 325 U.S. 711, 65 S. Ct. 1282 (1945)	25
Estate of Renick v. United States, 687 F.2d 371 (Ct. Cl. 1982)	20
Gould v. Gould, 245 U.S. 151, 38 S. Ct. 53 (1917)	20, 21, 22, 23
Hillsborough Tp. v. Cromwell, 326 U.S. 620, 66 S. Ct. 445 (1946)	28
Kelly v. District of Columbia, 102 Wash. D.L. Rptr. 2081, October 21, 1974 (Tax Docket 2225) (Penn, J.) (Kelly I)	27
Kelly v. District of Columbia, 105 Wash. D.L. Rptr. 577, April 5, 1977 (Tax Docket 2225) (Penn, J.) (Kelly II)	28
Korash v. Mills, 263 So.2d 579 (Fla. 1972)	18
Markham v. Friedland, 245 So.2d 645 (Fla. Dist. Ct. App. 1971)	18
Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S. Ct. 260 (1932)	19, 20, 21, 23
Partington v. Attorney General, L.R. 4 H.L. 100, 122	22
Tandy Leather Company v. United States, 347 F.2d 693 (5th Cir. 1965)	20

Table of Authorities Continued

Page

United States v. Merriam, 263 U.S. 179, 44 S. Ct. 69 (1923) 20, 21, 22

Wienberger v. Weisenfeld, 420 U.S. 636, 95 S. Ct. 1225 (1975) 27

Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886) 26

1111 19th Street Associates v. District of Columbia, 521 A.2d 260 (1987) 1

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Fifth Amendment of Constitution 3, 5, 6, 17, 19, 20, 21, 23, 24, 25, 27, 29

28 U.S.C. §1257 (3) 2, 6, 23, 25

D.C. Code §47-820 (1981 ed., formerly §47-641) .. 8

D.C. Code §47-823(a) (1981 ed., formerly §47-643(a)) 8

D.C. Code §47-829 (1981 ed., formerly §47-710) 11, 12

D.C. Code §47-831 (1981 ed., formerly §47-712) 2, 12, 13, 17, 19

IN THE

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NO. _____

1111 19TH STREET ASSOCIATES, LIMITED PARTNERSHIP,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, 1111 19th Street Associates, Limited Partnership, prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals entered on February 18, 1987, in 1111 19th Street Associates v. the District of Columbia, No. 85-56.

OPINIONS BELOW

The opinion of the Court of Appeals in the instant case is reported at 521 A.2d 260 (1987) and is reprinted in the Appendix, *infra*, p. 1a.

The Order of the Superior Court of the District of Columbia, Tax Division, in the instant case, is unreported and is reprinted in the Appendix, *infra*, p. 27a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was initially entered on February 18, 1987. Petitioner's Petition for Rehearing or Rehearing en Banc was timely filed on March 31, 1986, and was denied by the Court of Appeals on June 11, 1987. (App. 26a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

D.C. Code §47-831 (1981 ed.)

> If the Department of Finance and Revenue shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years, or has been so assessed that the assessment made was void, it shall be a duty at once to reassess this property for each and every year for which it has escaped assessment and taxation, and report the same, through the assessor, to the collector of taxes who shall at once proceed to collect the taxes so in arrears as other taxes are collected; Provided, that no property which has escaped assessment and taxation shall be liable under this section for a period of more than three years prior to such assessment, except in the case of property involved in litigation. In addition to the duties of the assessor hereinbefore provided, it shall be the duty of the assessor upon reassessment as herein provided to notify the taxpayer by writing of the fact of such reassessment. Any person aggrieved by any reassessment made in pursuance of this section may, within six months after notice of said reassessment, appeal

from said reassessment in the same manner and to the same extent as provided in §§47-3303 and 47-3304.

CONSTITUTION OF THE UNITED STATES
AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY;
SELF-INCRIMINATION; DUE PROCESS;
JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This is an appeal by the owner of real estate in the District of Columbia from a decision of the District of Columbia Court of Appeals affirming an order of the trial court which sustained the legality of certain "omitted property" assessments and additional real estate taxes on taxpayer's property for Tax Years 1980 and 1981.

Introduction

The original purpose of an omitted, or escaped, property statute was to ensure that no real property was omitted from the tax rolls or escaped taxation.

These statutes are ancient, dating in the case of the District of Columbia omitted property assessment statute from 1894. There is no question or doubt that, until an abberational decision in Florida and the instant decisions below, these statutes had a clear and precise meaning and purpose. They arose out of the imprecise methods of keeping tax assessment records, particularly in rural areas. Their intent and purpose was to ensure that no real property was "omitted" entirely, both as to land and improvements, from the assessment records. Once such an omission was "noticed" by the assessor, he was obliged "immediately" to assess it for "prior" years from which it had been omitted. In the case of the District of Columbia omitted property statute it may be assessed for three prior years.

As is clear from a detailed look at the record in this case, the taxpayer's property had been assessed regularly and with substantial increases for both of the tax years in question. Whether by design or negligence, the entire amount of the assessment was described as land, although the result to the taxpayer was the same. The assessor testified that, and the written record supports this, he "noticed" the building since its inception and more than four years before the date by which the District sought to assess the property using the omitted property statute.

A Writ of Certiorari should be granted because the trial court and the District of Columbia Court of Appeals interpreted the District of Columbia omitted property statute in an arbitrary and capricious manner, depriving taxpayer of its fundamental due process rights under the Fifth Amendment of the Constitution.

A 100-year line of cases of this Court, holding that where a tax statute is susceptible to more than one meaning it should be interpreted in favor of taxpayer, has created a Fifth Amendment right in taxpayer to this fundamental interpretation. Both the trial court and the Court of Appeals admitted that the omitted property statute was susceptible of two meanings, one in favor of the taxing authority and another in favor of the taxpayer.

One interpretation, and the original interpretation consistent with a protection of taxpayer's Fifth Amendment right, was that the 1894 District of Columbia omitted property statute provided that so long as the land was on the assessment record, assessed and taxes paid, there could not be an omitted property assessment under any circumstances.

The trial court's novel interpretation of this same statute, upheld by the Court of Appeals, was that if the assessor, knowing that a building was being constructed on the property, made a clerical mistake or arbitrarily nominated the entire assessment as land, he could use the omitted property statute, contrary to regular statutory procedures, to change the assessment by millions of dollars for three prior years.

Both lower courts interpreted the statute in favor of the taxing authority in an arbitrary and capricious manner and thus deprived the taxpayer of its Fifth Amendment right.

A Fifth Amendment right in favor of the taxpayer has also been created by the decisions of this Court for 100 years reasoning that equitable considerations may not be used in interpreting a tax statute. The trial court based its interpretation of the omitted

property statute in favor of the District upon equitable principles and the Court of Appeals affirmed this reasoning. Thus both courts deprived the taxpayer of the protection of its Fifth Amendment right in an arbitrary and capricious manner.

Equal protection of the laws under the due process clause of the Fifth Amendment applies to taxpayers in the District of Columbia. Only where a case could be resolved on the merits in favor of the party raising constitutional claims may a court decline to consider the constitutional claims raised by litigants. In the instant case, taxpayer raised its constitutional claims from the filing of the original complaint (Petition) to its Petition for Rehearing in the Court of Appeals. Both the trial court and the Court of Appeals refused to consider the constitutional issues raised by the taxpayer. The decisions below thus violated taxpayer's right to due process and equal protection guaranteed by the Fifth Amendment.

The issues in this case are not issues that affect only the District of Columbia, but are universal issues affecting all fifty states and the federal system. The primary issue in this case is whether the favorable interpretation of tax statutes for the benefit of taxpayer granted by decisions of this Court is to be challenged and changed after one hundred years for no compelling reason. The violations of taxpayer's Fifth Amendment rights by both the trial court and the Court of Appeals bring this case within the ambit of 28 U.S.C. §1257(3) permitting the grant of a Writ of Certiorari by this Court.

Facts and Procedural History

The property which is involved in this litigation is Lot 90 in Square 140 known as 1111 19th Street,

N.W. in the District of Columbia (hereinafter the "subject property"). The petitioner, 1111 19th Street Associates, Limited Partnership, D.F. Antonelli, Jr., General Partner, hereinafter "taxpayer", is the owner of the property and is obligated to pay all real estate taxes for the subject property. The respondent, the District of Columbia, hereinafter "the District", is the taxing authority herein.

In the District of Columbia, real property is assessed and taxed annually. The proposed annual assessment, valuing the property as of January 1, is received by the taxpayer in February or March. The taxpayer has until April 15th to appeal the proposed assessment to an administrative board, the Board of Equalization and Review. For example, the proposed Tax Year 1980 annual assessment values the property as of January 1, 1979, it is received by the taxpayer in February or March, 1979 and the administrative appeal must be filed by April 15, 1979.

In addition to the usual annual assessment, valuing the property as of January 1, there are three other types of assessments: (1) Annual Supplemental Assessment (for changes in the property between January 1 and June 30), (2) Second-Half Supplemental Assessment (for changes in the property between July 1 and December 31), and (3) Omitted Property Assessment (discussed further above).

In order to contest each of these assessments in court, except the omitted property assessment, the taxpayer is required to file an administrative appeal with the Board of Equalization and Review, and, for all assessments, to pay all real estate taxes.

The real estate taxes in this case are additional real estate taxes and interest in the approximate

amount of $622,554.00, which is approximately $187,083.00 for Tax Year 1980 (consisting of $137,561.10 in additional taxes plus interest), and approximately $435,471.00 for Tax Year 1981 (consisting of $320,226.32 in additional taxes plus interest).

Tax Year 1980: On or about March 1, 1979, taxpayer received a notice of annual assessment (D.C. Code §47-820, 1981 ed., formerly §47-641) for Tax Year 1980 in the amount of $4,715,100, as of January 1, 1979. No administrative appeal was filed with respect to this assessment. The taxes in the amount of $86,286.34 were timely paid. The Tax Year 1980 assessment in the amount of $4,715,100 thus became final on July 1, 1979. As of January 1, 1979, the District of Columbia's assessment record stated that building plans were submitted 2/7/77, that the property was inspected 12/17/77 and that the property was under construction 6/20/78 and 11/20/78. (R. 238)

Tax Year 1981: On or about March 1, 1980, the taxpayer received a notice of annual assessment (D.C. Code §47-820, 1981 ed., formerly §47-641) for Tax Year 1981 in the amount of $5,762,900 as of January 1, 1980. No administrative appeal was filed with respect to this assessment. The taxes in the amount of $122,749.78 were timely paid. The Tax Year 1981 assessment in the amount of $5,762,900 became final on July 1, 1980. Between January 1, 1979 and January 1, 1980, the valuation dates for Tax Years 1980 and 1981, the District's assessment record file states "6-15-79 50% complete". (R. 239)

The Department's assessment record file states "100% complete . . . 5/29/80". (R. 239)

As required by law, D.C. Code §47-823(a) (1981 ed.) (formerly §47-643(a), 1973 ed.), the assessed value of

the subject property was included in the published assessment rolls for both Tax Years 1980 and 1981 as well as Tax Year 1982. (Supp. R. 31-34)

For easy reference, the following is a summary of facts that were established from the District's written assessment record. (Petitioner's Trial Exhibits 3-9.)

(1) In February 1977, the taxpayer was issued a building permit and submitted building plans for the improvements.

(2) The District of Columbia assessor inspected the property in December 1977.

(3) The property was assessed as of January 1, 1978 for Tax Year 1979, and the assessment was increased from $1,444,130 to $3,588,715.

(4) The District of Columbia assessor inspected the property on June 20, 1978, and November 20, 1978, and made notations that it was "under construction".

(5) The property was assessed as of January 1, 1979 for Tax Year 1980, and the assessment was increased from $3,588,715 to $4,715,100.

(6) The District of Columbia assessor inspected the property on June 15, 1979, and made a notation that it was "50% complete".

(7) The property was assessed as of January 1, 1980 for Tax Year 1981, and the assessment was increased from $4,715,100 to $5,762,900.

(8) In April 1980, the taxpayer's management agent wrote to the District of Columbia inquiring as to whether an income and expense form was required for this property.

(9) On May 29, 1980, the District of Columbia assessor inspected the property and made the notation "100% complete".

(10) The property was assessed as of January 1, 1981, for Tax Year 1982 in the amount of $5,762,900.

(11) On or before April 1, 1981, the taxpayer filed the required income and expense form for the subject property for calendar year 1980.

(12) On June 24, 1981 an annual supplemental assessment was made of $15,113,100 on the improvements on the property for a total assessment of $20,876,000.

(13) The property and its assessment appeared on the Assessment Roll for each of the tax years in question.

During the relevant time period for the subject tax years (calendar years 1979 and 1980), when the District was reviewing the construction progress and making annual assessments, the taxpayer did not do anything which would have interfered with the assessment process. The taxpayer, in fact, wrote to the District in April 1980 specifically referencing this property's office building and asking whether an income-expense form was required for calendar year 1979 (Supp. R. 36-37), and, in April 1981, the taxpayer filed an income-expense form for calendar year 1980. (Supp. R. 37-38)

On or about September 3, 1981, the taxpayer's management agent was notified by the agent for the lender, who escrows and issues payment of real estate

taxes for the subject property, that the total real estate taxes listed as due for the first half of Tax Year 1982 was $444,675.84. On September 11, 1981, taxpayer received a "Notice of Property Assessment for Tax Year 1982", dated September 8, 1981, stating an increase in total assessment for Tax Year 1982 from $5,762,900 to $20,876,000 with the stated "Reason For Change: Permit Work." (R. 15) The notice further informed the taxpayer that an appeal to the Board of Equalization and Review could be filed "between September 1 and September 30 . . .".

Prior to the receipt of this notice, in a series of telephone conversations with Mr. Klugel, Chief of Standards and Review, District of Columbia Department of Finance and Revenue, prompted by taxpayer's counsel's efforts to determine the reasons for the tax billing amount, Mr. Klugel stated that a supplemental notice of assessment (D.C. Code §47-829, 1981 ed. formerly §47-710, 1973 ed.) had been mailed. When informed that the assessment would be appealed to the Board of Equalization and Review ("the Board") because there had not been any building activity subject to a supplemental assessment during the relevant time period (January 1, 1981 to June 30, 1981 for Tax Year 1982), Mr. Klugel promised that the assessment would be cancelled and that no appeal was necessary. Mr. Klugel also promised that a corrected tax bill based on the Tax Year 1982 annual assessment of $5,762,900 would be sent. Consequently, the taxpayer did not file an administrative appeal. (Supp. R. 13-19) Counsel for the taxpayer called Mr. Klugel periodically, including on October 27, 1981, to inquire as to when the corrected bill would be received and Mr. Klugel continued to state that the corrected bill

would be sent. (Supp. R. 18) Mr. Klugel did not perform his promise (Supp. R. 15) and never informed the taxpayer or its counsel that the District was not performing the promise. (Supp. R. 18-19)

Instead, on November 12, 1981, taxpayer's counsel received in the mail a copy of a letter dated October 19, 1981, from Robert L. King, Acting Associate Director of the Department of Finance and Revenue, stating that the use of §47-710 for permit work was untimely and that " . . . we have concluded that the improvements to the property have *never* been assessed since construction began in 1977. Therefore, pursuant to §47-712 (the omitted property statute), we have assessed the improvements to the subject property for Tax Years 1980, 1981 and 1982." The letter proceeded to state that tax bills were enclosed for payment within 30 days, i.e., on or before November 18, 1981. (R. 17-20) The taxpayer received the original of the letter on or about November 9, 1981. The delay in receipt of the letter is unexplained. Subsequently, at the request of the taxpayer, through counsel, the date for response to the purported tax bills was extended by the Department to December 9, 1981, and then to December 31, 1981. (R. 240-241)

The assessment record card for this property, as the record card existed on October 19, 1981, the date of the purported assessments at issue, did not reflect that any such assessments had in fact been made. The purported assessments were not, in fact, noted on the assessment record card until July 1982 when Mr. Klugel ordered that certain entries be made during discovery in this case (Supp. R. 28-29). And the entries ordered by Mr. Klugel, some nine months after the claimed assessments, incorrectly reflected only a

second-half assessment for Tax Year 1980. (Supp. R. 50)

The tax billings were timely paid on December 31, 1981. (R. 241)

During September and October 1981 when Mr. Klugel was discussing the invalid annual supplemental assessment with taxpayer for Tax Year 1980 he took similar actions with respect to several other unrelated properties which did not, however, later receive "omitted property" assessments. (Supp. R. 39-43) Indeed, following these promises, Mr. Klugel wrote a memorandum to Mr. Richard Aguglia, Assistant Corporation Counsel in the Tax Division of the Office of the Corporation Counsel for the District, requesting that Mr. Aguglia determine the applicability of an "omitted property" assessment. (App. 62a; Supp. R. 19-20) Mr. Aguglia then directed the Department to proceed with omitted property assessments on taxpayer's property. (Supp. R. 48)

Petitioner timely filed a Petition with Exhibits in the Tax Division of the Superior Court of the District of Columbia on January 4, 1982. (App. 52a) The Petition alleged the illegality, invalidity and unconstitutionality of assessments by the District purportedly made under D.C. Code §47-712 (1973 ed., now §47-831, 1981 ed.) and prayed for the refund of additional real estate taxes paid in the amounts of $137,561.10 for Tax Year 1980 and $320,226.32 for Tax Year 1981. (R. 1, 8, 21-22) The Petition also sought attorney's fees and interest on the refund at market rates. (R. 8) The Petition alleged the illegality, invalidity and unconstitutionality of the assessments on the grounds, *inter alia*, that the property had been assessed and taxes paid for the subject tax years, the

property had not been omitted from assessment or taxation, the assessments did not comply with any statutory authority, the assessments had been made at the instruction of the Office of the Corporation Counsel, the District had knowledge of the improvements on the subject property since it first learned of the improvements in 1977, and that the assessments violated taxpayer's constitutional rights. The Petition also alleged that the only assessments made according to law were the annual assessments for Tax Years 1980 and 1981, pursuant to which the required taxes had been paid. (R. 6-7)

On February 18, 1982, the District filed its Answer to the Petition admitting the taxpayer's factual allegations but denying the taxpayer's entitlement to relief. (R. 53)

Stipulations were filed at the beginning of trial on December 13, 1983. (R. 238) The stipulations recited in one document most of the numerous factual statements set forth in the Petition and admitted by the District's Answer, including the amounts of the additional taxes and contested assessments, the timely payment of the additional taxes and the amounts of the prior timely annual assessments and the taxes paid. The stipulations also included the details of the various written communications from the District describing its various actions with respect to the subject assessments and the earlier attempted annual supplemental assessment for Tax Year 1982, which initiated the events leading to this litigation. (R. 238 *et seq.*)

At the trial on December 13, 1983, before Judge Iraline Barnes, Mr. Klugel was the only witness called by the taxpayer and he testified pursuant to a subpoena *duces tecum*. Mr. Klugel's testimony (Supp. R.

12-55), briefly summarized, was that he agreed with the taxpayer's summary of events leading to the subject assessments, that he had promised that a corrected tax bill for Tax Year 1982 reflecting taxes on the annual assessment would be sent, that the taxpayer had not filed an administrative appeal based on that promise, that he had never informed the taxpayer that the District was not going to perform that promise, and that, instead, he had been instructed by Mr. Aguglia, Assistant Corporation Counsel, that the property be subjected to an "omitted property" assessment. Mr. Klugel also testified that the property's assessment record, including the assessment rolls, indicated the property's annual assessment for each year. The assessment record card did not show any "omitted property" assessments from October 19, 1981, the date the subject assessments were supposedly made, until July 1982. In July 1982, Mr. Klugel ordered that entries be made on the card that omitted property assessments had been made for the second half of Tax Year 1980 and for Tax Years 1981 and 1982. He testified that the entries were incorrect as to Tax Year 1980. The witness testified that the assessors had reviewed the property beginning in 1977, made periodic notations as to the progress of construction, until completed in 1980, and that the taxpayer had provided all the required information and had done nothing to hide any relevant facts. In his testimony, Mr. Klugel admitted that no other property which had received a supplemental assessment at the same time had been subject to an "omitted property" assessment.

At the conclusion of Mr. Klugel's testimony, the taxpayer rested its case and the District did not move

for judgment nor present any witnesses. (Supp. R. 57, 60) Following final argument by counsel for both parties, the court took the matter under advisement and asked both counsel to submit proposed findings of fact and conclusions of law by January 6, 1984. Taxpayer filed its proposed findings and conclusions as did the District.

Subsequently, on May 15, 1984, the trial court, Barnes, J., entered an opinion and order dated May 14, 1984, including Findings of Fact and an analysis and conclusion. (App. 27a) The court ruled that the subject assessments were imposed legally. In reaching this conclusion, the trial court ruled that the omitted property statute was susceptible to two meanings. One interpretation was that a portion of a property could not be omitted and that to be an "omitted property" under the statute, the entire property must not have been assessed and taxed. The other interpretation was that a portion of a property could be omitted and retroactively assessed. The court adopted the interpretation of the statute favorable to the District and held that an "omitted property" assessment could apply to only the improvements on a tax lot, that the assessor had not previously noticed the improvements, and that equitable considerations favored the District. In a footnote, the court also held that the assessments were timely and that it was unnecessary to reach the constitutional arguments advanced by the taxpayer.

The taxpayer then filed a Motion for Reconsideration and Rehearing which was opposed by the District. (R. 329) By order entered December 10, 1984 (App. 44a), the trial court, Barnes, J., denied taxpayer's Motion for Reconsideration and Rehearing.

Taxpayer timely filed a Notice of Appeal to the District of Columbia Court of Appeals on January 1, 1985 and filed its brief on June 4, 1985. (App. 80a) In its brief, taxpayer argued that the trial court's finding that the omitted property statute was susceptible to two meanings but that it should be construed in favor of the District and using equitable considerations, was contrary to the law of this Court and a violation of taxpayer's Fifth Amendment rights. The taxpayer pointed out that the subject property was previously assessed and taxed for each of the subject tax years. Taxpayer also argued that the trial court erroneously concluded that no determination was necessary on taxpayer's claims of denial of due process and equal protection of the laws.

On September 9, 1985, the District filed its brief in the District of Columbia Court of Appeals. The District argued that the real property tax assessment statutes should be interpreted to permit separate assessment of land and improvements, and that a failure to assess improvements constituted an omitted assessment.

Oral argument was held on March 10, 1986. The Court of Appeals issued its decision on February 18, 1987, affirming the judgment of the trial court. (App. 1a) In construing D.C. Code §47-831, the "omitted property" assessment provision, the court admitted that the statute was susceptible of two meanings but then interpreted the statute in favor of the taxing authority. The court summarily concluded that the land had been assessed and the office building had not been assessed by the District of Columbia. The Court stated that the taxpayer was aware that the building was omitted and that "a hefty tax was thus

erroneously not to be charged" (App. 18a) and that therefore, the building was property liable to taxation but omitted from the assessment. The court concluded that, while members of the Department of Finance and Revenue were informed with respect to the improvements on the property, the failure to assign a value to improvements did not evidence the Department's valuation of the improvements at zero. (App. 25a)

The Court of Appeals noted that there is a split on the application of whether property has been "previously assessed" and therefore is not "omitted property". (App. 19a) The court stated that it agreed with *Korash v. Mills*, 263 So.2d 579 (Fla. 1972) and attempted to distinguish another Florida case, *Markham v. Friedland*, 245 So.2d 645 (Fla. Dist. Ct. App. 1971) as being a case in which there was a change in judgment by successive tax assessors.

The court concluded that the decision reached by the trial court

> "is in furtherance of the fair 'sharing of the financial burden of the government'. This is a goal which should be sought. The outcome of this case is legally and equitably justified."
>
> App. 25a

Taxpayer filed a Petition for Rehearing or Rehearing en Banc on March 31, 1987. The District opposed on May 18, 1987, and on June 11, 1987, the Court of Appeals denied taxpayer's Petition for Rehearing. (App. 26a)

REASONS FOR GRANTING THE WRIT

A. The decisions of the trial court and the Court of Appeals deprived taxpayer of its Fifth Amendment

right to a favorable statutory interpretation of the omitted property statute after concluding that the statute was susceptible of two meanings.

In violation of the Fifth Amendment of the Constitution of the United States, the Court of Appeals deprived the taxpayer of its property without due process of law where the Supreme Court has held continuously since before 1880, that when a taxing statute is susceptible to two meanings, the court must interpret the statute in favor of the taxpayer. The trial court concluded that the omitted property assessment statute, D.C. Code §47-831, was susceptible to two meanings and went on to conclude that the meaning which would sustain the assessments should control. In so holding, both the trial court and the Court of Appeals in affirming the trial court violated the Fifth Amendment rights of the taxpayer protected by the Constitution.

> [*I*]*t is elementary that tax laws are to be interpreted liberally in favor of 'taxpayers'* " and [D]oubts must be resolved against the government and in *favor of taxpayers. Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 508, 52 S.Ct. 260, 263 (1932).

The Court of Appeals also admitted the ambiguity, first reciting the trial court's admission of ambiguity (App. 18a) then conceding that the language is susceptible to two meanings (App. 18a). The Court of Appeals, in violation of the taxpayer's Fifth Amendment rights, concluded that the assessor could use the omitted property statute to correct his own mistakes.

The trial court's opinion and order reversed, without any arguable justification, this overriding Fifth Amendment protection of taxpayers in the construction of tax statutes. The long established Fifth Amendment principle requires that, where differing interpretations of revenue laws are possible, the tax statutes must be construed strictly against the taxing authority and liberally in favor of the taxpayer. This principle is found almost word for word in *Miller, supra*, wherein the Court in 1932 held it to be "elementary" that tax laws be interpreted liberally in favor of taxpayers where this Court found that the Commissioner had wrongfully enlarged the definition of oleomargarine to apply to the tax petitioner's product. Earlier, in *Gould v. Gould*, 245 U.S. 151, 38 S.Ct. 53 (1917), the Court recognized the established rule that, in construing tax statutes, all doubts should be construed "most strongly" against the government and in favor of the citizen.

These long established and unequivocal precedents have been often repeated both in this Court and in lower courts in the last 70 years. In *U.S. v. Merriam*, 263 U.S. 179, 44 S.Ct. 69 (1923), this Court followed *Gould*, stating that, where words in the levying statute are doubtful, the doubt must be resolved in favor of the taxpayer. This principle has been followed by the Circuit Courts. *See, e.g. Busse v. Commissioner of Internal Revenue*, 479 F.2d 1147 (7th Cir. 1973); *B&M Company v. U.S.*, 452 F.2d 986 (5th Cir. 1972); *Tandy Leather Company v. U.S.*, 347 F.2d 693 (5th Cir. 1965); *Estate of Renick v. U.S.*, 687 F.2d 371 (Ct. Cl. 1982).

B. The decisions of the trial court and the Court of Appeals, using equitable principles in interpreting

the omitted property statute, deprived taxpayer of its Fifth Amendment right in an arbitrary and capricious manner.

In violation of the Fifth Amendment, the Court of Appeals deprived the taxpayer of its property without due process of law where the Supreme Court has said continuously since before 1880 that a court may not take into consideration equitable factors in interpreting a tax statute. Throughout its opinion, to avoid the required result from *Miller*, *Gould* and *Merriam*, *supra*, the trial court cited "equitable considerations". The trial court's opinion made clear that a construction of the statute in favor of the District as the taxing authority was chosen because of the court's perception of " . . . compelling inequities as an inevitable result of the kind of case presented in this action". (R. 287-88). Ignoring that this underlying suit is an action at law, the trial court made frequent reference to equitable factors.[1] While not addressing the issue directly, the Court of Appeals also referred to equitable factors in favor of the District. In its opinion, the Court of Appeals stated that the taxpayer

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[1] There follows illustrative language that the trial court used to justify equitable factors favorable to the District:

> . . . the court cannot reward the taxpayer and punish the District (R. 287)
>
> . . . the taxpayer should not be permitted to avoid his share . . . [of taxes] (*Id.*)
>
> . . . the philosophy underlying the omitted property provision is one of fairness in apportioning the tax burden . . . (*Id.*)
>
> It followed logically that a taxpayer having notice that his property has escaped taxes which would properly be due, should not stand to benefit by avoiding payment of an equitable share of the tax burden. (*Id.*)

was aware that the building had been omitted from assessment and that "a hefty tax was thus erroneously not to be charged on this tax account". (App. 23a). The Court of Appeals concluded its opinion by stating that the trial court decision "is in furtherance of the fair sharing of the financial burden of the government" and that the outcome of the case is "equitably justified". (App. 25a)

Both lower courts' assumption that the taxpayer could be spared a heavier tax burden if the assessments were not sustained is irrelevant. The issue before the court was not who should be rewarded or who should be punished. That sort of argument was put to rest at least as early as 1923 in *Merriam, supra*, when Mr. Justice Sutherland noted with approval the *Gould* opinion and quoted the House of Lords opinion by Lord Cairns in *Partington v. Attorney General*, L.R. 4 H.L. 100, 122:

> . . . If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. *In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the staiute.* (Emphasis supplied), quoted in *Merriam*, 263 U.S. *supra* at 188, 44 S.Ct. *supra* at 71.

This guiding precept has never been modified and was repeated in 1930 in *Crooks v. Harrelson*, 282 U.S. 55, 51 S.Ct. 49 (1930). Only the "letter of the law" can apply and any doubt must be resolved in favor of the taxpayer.

C. Certiorari should be granted because the rights of the taxpayer, protected by the Fifth Amendment of the Constitution, have been violated by the decisions of both the trial court and the District of Columbia Court of Appeals.

The decisions of this Court from those cited in *Miller v. Standard Nut*, 284 U.S. 498, in 1932 and unchanged for 100 years (See Section A, above), have provided protection for the taxpayer by creating an interest protected by the Fifth Amendment. This protected right is more specifically defined in Section A, above, as the right of a taxpayer, where a tax statute is susceptible of two interpretations, to the interpretation most favorable to the taxpayer. A Fifth Amendment right in favor of the taxpayer has also been created by the decisions of this Court since *Gould v. Gould*, 245 U.S. 151 in 1917, reasoning that equitable considerations may not be used in interpreting a tax statute. The protection of this right was denied by the trial court and the Court of Appeals in this case.

Both of these rights, protected by the Fifth Amendment and embedded in 100 years of uncontradicted decisions of this Court, describe perfectly the type of protected right referred to in the third clause of 28 U.S.C. §1257(3): ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The claim of a violation of the constitutional rights of the taxpayer was timely raised below in the original complaint (Petition), the Motion for Reconsideration and Rehearing, Briefs in the District of Columbia Court of Appeals, and particularly the Petition for Rehearing. See R. 1 and 289.

This is not the only reason that this Court should take an interest in the matter. The federal government leases millions of square feet in the District of Columbia, where it is itself a taxpayer. In situations where the federal government is not exempt from District of Columbia real estate taxes but would itself be subject to the same kind of discriminatory treatment at the hands of the District of Columbia, hundreds of millions of dollars could be involved.

Section D, below, speaks for itself; taxpayer sought in the trial court to argue a violation of its equal protection rights under the Fifth Amendment. The trial court erroneously ruled that, having decided the case against taxpayer on statutory grounds, she did not have to decide the constitutional issue. Of course the trial court had the argument backwards. This would be applicable only if the case had been decided in favor of the taxpayer on statutory grounds. Thus another and simpler ground exists for granting a Writ of Certiorari, which is failure to give the taxpayer a fair hearing on its constitutional argument. The Court of Appeals ignored the issue in its opinion when it was argued originally and again when the issue was argued for rehearing.

It is immaterial that hundreds of thousands of dollars are involved in this case or that hundreds of millions may be involved for other taxpayers including the United States itself. The critical issue is the prin-

ciple—that the Court of Appeals has seen fit to take away a fundamental Fifth Amendment right from any taxpayer on any one of these three principles just enunciated, whether it is for one cent or ten million dollars.

When a taxing statute is susceptible of more than one meaning, the taxpayer is entitled to have the statute interpreted in its favor. And the taxing authority is not entitled to equitable considerations, the taxpayer is. As both of these rights were denied the taxpayer by the trial court and the Court of Appeals, the taxpayer may assert a claim for a Writ of Certiorari under 28 U.S.C. §1257(3) for deprivation of one or more protected rights as well as the failure to permit him to argue his constitutional deprivation of equal protection as discussed below in Section D. These are the grounds for a grant of a Writ of Certiorari if this Court should so will and consider the case of sufficient importance.

D. Both of the lower courts in this case violated the taxpayer's constitutional rights by failing to consider the taxpayer's constitutional claims.

The trial court erroneously concluded that no determination was necessary on the taxpayer's claims of denial of due process and equal protection of the laws. (n. 3, R. 288). The Court of Appeals did not even mention the constitutional issues. This conclusion violates and misapplies a basic principle of judicial review. A court should decline to determine constitutional issues only where those issues would be resolved on the merits in favor of the party whose other nonconstitutional claims result in a favorable disposition of the case. *Elgin, J. & E. Ry. Co. v. Barley*, 325 U.S. 711, 720, 65 S.Ct. 1282, 1288 (1945). This

was not the situation as decided by the trial court and the Court of Appeals. In this case, the trial court could have justified the failure to reach the taxpayer's constitutional claims only if that court had found the assessments illegal on any one of the numerous non-constitutional grounds. Instead, the trial court ruled that the assessments were legal under the court's view of the statute and that the constitutional claims did not have to be considered.

The taxpayer's constitutional claims have obvious merit. As fully documented by the record, this taxpayer, and only this taxpayer, was singled out to receive assessments for an "omitted property".

This taxpayer's property, and only this taxpayer's property, was the topic of written memoranda detailing the efforts of the Department of Finance and Revenue under the direction of the Office of the Corporation Counsel to assert, assess and tax this property as omitted. Although the District could not identify all of the other properties (at least six) which had received annual supplemental assessments in the late summer of 1981 and which were subsequently withdrawn or cancelled by the District as illegally entered, the evidence of the existence of any one other property which received dissimilar treatment, standing alone, requires constitutional inquiry and reversal. The admission that none of these other properties were documented in any way and none were the subject of written memoranda is further evidence of unequal treatment.

This taxpayer was singled out and was the only one to receive such special treatment. This discriminatory treatment is unconstitutional. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886).

Equal protection of the laws under the due process clause of the Fifth Amendment to the Constitution applies to the residents and taxpayers of the District of Columbia and requires equal treatment of all persons similarly situated. *Wienberger v. Weisenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1228 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954).

Taxpayer's Motion for Reconsideration of the trial court decision (R. 289) called all of this to the trial court's attention. In the order denying reconsideration and rehearing, the court again refused to consider the constitutional claims when the court stated it recognized that equal treatment is vital to *equitable* administration of taxing statutes but concluded that the assessments resulted in the taxpayer paying its *equitable* taxes. (R. 344). It is significant that the court also asserted the perceived equities in favor of the District. Under the trial court's view, no taxpayer could ever be denied equal protection of the law because this pronouncement is that, even if treatment is unequal, equity requires upholding the taxing authority.

It is, however, fundamental under our constitutional system that taxpayers who are in the same class cannot be subjected to unequal taxation no matter how the unequal treatment is supposedly justified. The courts in this jurisdiction have previously had no difficulty in correctly holding that the constitutionally guaranteed right to equal treatment and due process cannot be ignored by the simplistic argument that the taxing authority is trying to collect taxes. *See, e.g., District of Columbia v. Green*, 348 A.2d 305 (D.C. 1975); *Kelly v. District of Columbia*, 102 Wash.D.L.Rptr. 2081, October 21, 1974 (Tax Docket

2225)(*Kelly I*); *Kelly v. District of Columbia*, 105 Wash.D.L.Rptr. 577, April 5, 1977 (Tax Docket 2225)(*Kelly II*).

The taxpayer here was the only one of at least six owners who received annual supplemental assessments to receive the individualized treatment of an "omitted property" assessment in place of the withdrawn assessment. It is axiomatic that this taxpayer was not treated equally. The guarantee of equal protection guards against such unequal treatment which selects one taxpayer for discriminatory treatment by imposing taxes not imposed on all other taxpayers similarly situated. The failure to administer the tax provisions equally to all taxpayers similarly situated violates the Constitution. *Hillsborough Tp. v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1946).

A separate denial of due process approved by the trial court flows from the District's failure to perform its promise that the taxpayer would receive a corrected tax bill, as did all other taxpayers in the same situation. When the District promised that the annual supplemental assessment would be withdrawn, that no administrative appeal was necessary and that a corrected tax bill would be sent, the taxpayer relied on the promise to its detriment. In reliance on the District's promise, the taxpayer did not file an administrative appeal and fully performed as the District wanted. Instead of performing its promise, the District, without even informing the taxpayer of its intention to break its promise, proceeded to other action requiring the taxpayer to pay additional taxes for earlier tax years and undertake this litigation. If the taxpayer had appealed the annual supplemental as-

sessment at that time and even if court litigation had been necessary, the issue to be determined would have been solely the illegality of that annual supplemental assessment. Instead, the District's actions caused the taxpayer to relinquish that right, and the entire record and consequences of this intentional breach by the District was completely ignored by the trial court and the Court of Appeals.

The lower courts' refusals to consider the taxpayer's constitutional claims were a clear violation of taxpayer's due process and equal protection rights.

CONCLUSION

In the absence of review by this Court, the District of Columbia Court of Appeals will have successfully deprived the Petitioner of its Fifth Amendment right to have a tax statute construed in favor of a taxpayer.

Petitioner respectfully urges that the Writ of Certiorari issue.

Respectfully submitted,

GILBERT HAHN, JR., ESQ.
JAMES J. GROSS, ESQ.
AMRAM AND HAHN, P.C.
Suite 1100
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 783-3344
Attorneys for Petitioner

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-56

1111 19TH STREET ASSOCIATES, APPELLANT,

v.

DISTRICT OF COLUMBIA, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Hon. Iraline G. Barnes, Trial Judge)

(Argued March 10, 1986 Decided February 18, 1987)

Gilbert Hahn, Jr. for appellant.

Richard L. Aguglia, Assistant Corporation Counsel, with whom *John H. Suda*, Acting Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, *James R. Murphy*, Deputy Corporation Counsel, and *Lutz Alexander Prager*, Assistant Deputy Corporation Counsel, were on the brief, for appellee.

Before PRYOR, *Chief Judge*, BELSON, *Associate Judge*, and GALLAGHER, *Senior Judge*.

GALLAGHER, *Senior Judge*: In this appeal we are asked to decide whether the trial court properly held that improvements to realty constituted "omitted" property

within the meaning of D.C. Code § 47-831 (1985 Supp.)[1] and are therefore subject to retroactive assessment and taxation. This dispute concerns District of Columbia real property taxes of $137,561.10 for the 1980 tax year and $320,226.32 for 1981. The taxpayer, appellant 1111 19th Street Associates, principally contends that the improvements in question cannot be characterized as "omitted" property under the statute because the District government had assessed the property in its entirety for these tax years while having knowledge of the construction and completion of the subject improvements. The District government counters that the value ascribed to the taxpayer's property for purposes of assessment was specifically allocated solely to the land, and that § 47-831 could therefore be used to remedy the District's inadvertent failure to value and tax the improvements. We agree with the government, and affirm the judgment of the trial court.

I.

The pertinent facts in this case are for the most part not in dispute.[2] The taxpayer, a District of Columbia limited partnership, is the owner of the property, which is located at 1111 19th Street, N.W., and is therefore obligated to pay all real estate taxes assessed against the property by the District government.

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[1] Section 47-831's predecessor, *id.* § 47-712, (1973), was extant when this dispute arose. The new statute, which we refer to herein, is essentially a recodification of § 47-712 (1973).

[2] Pursuant to Super. Ct. Tax R. 11 (b), the parties entered into a stipulation of evidence prior to trial which the trial court primarily relied upon for evidence in reaching its decision. The trial court's opinion in this matter, which includes a factual recitation we have elaborated upon here, is reported in *1111 19th Street Assoc. v. District of Columbia,* 112 Daily Wash L. Rptr. 1317 (July 3, 1984).

On or about March 1, 1979, the taxpayer received a notice of annual assessment pursuant to D.C. Code § 47-824 (1981) (formerly *id.* § 47-645 (Supp. V 1978)) for the 1980 tax year reflecting a property valuation of $4,715,100 as of January 1, 1979. The assessment notice, which was sent by the Department of Finance and Revenue (the "Department"), ascribed the entire $4,715,100 value to the land, and no value to improvements as evidenced by blank spaces on the notice corresponding to the "building" category. The Department's assessment record card for the property also indicated, in the same manner, that the entire assessed value was attributed to the land, with no value having been assigned to improvements.[3] Yet, as of and prior to the 1980 tax year valuation date of January 1, 1979, the Department's assessment record file included notations that building plans were submitted February 7, 1977, the property was inspected December 17, 1977, and construction was in progress on June 20 and November 20, 1978. According to Mr. Robert L. Klugel (the only witness at trial), who was Acting Supervisor of the Department's Standards and Review Unit when this dispute arose, these notations were made in the file on the basis of on-site observations by Department employees. In any event, no appeal of the assessment was filed,[4] and the taxpayer timely paid 1980 taxes in the amount of $86,286.34.

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[3] An examination of this assessment record card, as well as the notice of property assessment for the 1980 tax year, reveals that the 1979 tax year assessment for the property amounted to $3,588,715, all of which was attributed to land. An earlier assessment record card containing tax year 1978 entries indicates that the property was assessed a valuation of $1,444,130 for 1978. This assessment was also attributed solely to land.

[4] *See* D.C. Code § 47-825 (i) (1981) (formerly *id.* § 47-709 (1973)).

On or about March 1, 1980, the taxpayer received a notice of annual assessment for tax year 1981 reflecting a valuation of $5,762,900 as of January 1, 1980. No appeal of this assessment was filed, and the taxpayer timely paid taxes in the amount of $122,749.78. The notice of property assessment was identical in form to the notice for the previous tax year, and like the previous notice, attributed the entire assessed value only to land. The same assessment record card contained tax year 1981 entries and, as with tax year 1980, did not show any value whatsoever assigned to improvements. However, sometime between January 1, 1979 and January 1, 1980, the valuation dates for tax years 1980 and 1981, the notation "6-15-79 50% complete" was made in the assessment record file. Klugel testified that this report was also made on the basis of an on-site observation of the property.

In April 1980, the taxpayer's management agent for the property, Charles E. Smith Management, Inc., submitted "income-expense" forms for calendar year 1979 to the assessment division of the Department for several of the properties it handled.[5] In an accompanying letter of transmittal, the agent notified the Department that "no form was received for the property at 1111 19th Street, N.W. [the taxpayer's property], which we opened in mid-1979. If an income-expense form is required for this building, please forward us one and we will complete it." In April of the following year, the taxpayer's agent filed a calendar year 1980 income-expense form with the Department for the premises at 1111 19th Street, N.W.

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[5] *See* D.C. Code § 47-821 (d) (1981 & Supp. 1985) (formerly *id.* § 47-642 (Supp. V 1978)).

The taxpayer received a notice of annual assessment for tax year 1982 on or about March 1, 1981, and it reflected a property valuation of $5,762,900 as of January 1, 1981. Despite having filed no appeal from this assessment, the taxpayer never received the tax bill of $122,749.78. The assessment notice and record card entries for this tax year, like those for the prior years, ascribed the property's assessed value entirely to the land alone. However, sometime between January 1, 1980 and January 1, 1981, the valuation dates for the 1981 and 1982 tax years, the notation "100% complete . . . 5/29/80" —a notation also reflecting someone's personal observation according to Klugel—was made in the assessment record file.[6]

On September 11, 1981, the taxpayer received a "Notice of Property Assessment for Tax Year 1982" which reflected an increase in the property's 1982 assess-

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[6] The "assessment record file," which the parties ambiguously referred to in their stipulation of evidence and which we have referred to herein, contains among other documents the property's assessment record card (which we have also referred to in this opinion) and "Construction Permit Card," each of which was introduced into evidence at trial. With the exception of the one notation mentioned above that building plans were submitted February 7, 1977, the notations we have referred to as having been made periodically in the assessment record file were, perhaps more accurately, made on the Department's construction permit card for the property. In addition to these notations on the construction permit document, there are other cryptic notations, including "Stories: 100% Completed 6/24/81, Imps Never Got in System" and "S.N.Y." The last notation appears on the document before some of the other entries we have referred to in text, *e.g.*, "S.N.Y. Inspected 12-17-77." Robert Klugel testified at trial that "S.N.Y." in this context means "See Next Year."

ment from $5,762,900 to $20,876,800.[7] The difference, $15,113,900, was attributed solely to the office building improvements on the land as established by the inclusion of that sum on the assessment notice in spaces corresponding to the "building" category. The notice indicated that "Permit Work" was the reason for the adjusted assessment. The notice also informed the taxpayer that an appeal of the assessment to the Board of Equalization and Review could be filed "between September 1 and September 30," a right provided by D.C. Code § 47-829 (a) (1985 Supp.) (formerly *id.* § 47-710 (1973)) which authorizes, among other things, supplemental assessments based upon "new structures erected or roofed" since the previous assessment valuation.[8]

Soon after the taxpayer received notice of the supplemental assessment, its counsel conferred with Robert Klugel on the legality of assessment under § 47-829 (a). Because no new construction had occurred on the property since tax year 1982's valuation date, January 1, 1981, counsel asserted that the supplemental assessment under § 47-829 (a) was untimely. They discussed the possibility of restoring the assessed value to the original tax year 1982 figure ($5,762,900) contained in the notice of assessment that the taxpayer had received in March.

On September 16, 1981, Klugel wrote to Corporation Counsel Richard L. Aguglia, Chief of the Taxation Sec-

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[7] This notice was dated September 8, 1981. As the trial court noted in its opinion, about a week earlier the taxpayer's management agent was notified by the agent for the lender-mortgagee that the annual tax listed in the tax billings for the first half of the 1982 tax year was $444,675.84.

[8] The parties stipulated prior to trial that the taxpayer did not exercise its rights to appeal in reliance on a promise from the Department that no appeal was necessary. *See supra* note 2.

tion, to express his opinion that the supplemental assessment increase under § 47-829 was improper. Klugel requested Corporation Counsel's "endorsement" of this opinion, as well as its advice on whether the improvements could nevertheless be assessed as "omitted" property under § 47-831.[9] The government responded by a memorandum to Klugel dated September 22, stating that the § 47-829 supplemental assessment notice was invalid "and should have been made in 1980 for September 15, 1980 billing purposes." Aguglia maintained, however, that the improvements could be assessed as omitted property because the improvements had altogether escaped taxation. The two subsequently conferred and a determination was made to withdraw the supplemental assessment and to impose an omitted property assessment to account for the value of the improvements.[10]

On November 9, 1981, the taxpayer received by mail a letter dated October 19, 1981, from Robert L. King, Acting Associate Director of the Department, which notified the taxpayer that the notice of supplemental assessment for tax year 1982 issued pursuant to § 47-829 was being withdrawn, and further that an omitted property assessment was being levied.[11] The taxpayer was specifically informed:

> [T]he use of [§ 47-829] . . . for permit work was untimely. Please consider that notice void.

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[9] In his memorandum, Klugel advised Aguglia that the improvements would be included in the tax year 1983 assessment whether or not assessable retroactively as omitted property.

[10] There is no dispute that the property was improperly assessed under § 47-829. Since this issue is not now before us, we do not consider it.

[11] A copy of King's letter was received by the taxpayer's counsel on November 12. The delay in receipt of the October 19 letter by the taxpayer and its counsel is unexplained.

> However, in reviewing the files, we have concluded that the improvements to the property have *never* been assessed since construction began in 1977. Therefore, pursuant to [§ 47-831, the omitted property statute,] we have assessed the improvements to the subject property for tax years 1980, 1981 and 1982. [Emphasis in original.]

Tax bills were enclosed, indicating that payment would be required within 30 days.[12] Subsequently, extensions were obtained from the Department. The taxpayer paid the disputed taxes—$137,561.10 for tax year 1980 and

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[12] The tax bills received with the October 19 letter contained the following language (but not in this form):

> (a) "Payer's Receipt;" "Fiscal Year 1980;" "Total Assessed Value 12232100;" "Total Tax 137561.10;"
>
> (b) "1981 SECOND HALF TAX BILL CLASS III;" "IMPS ADDED;" "ADMIN. ERROR;" "TOTAL ASSESSMENT AT MARKET VALUE 20797000;" "Payment Due by Mar 31 81;" "FULL YEAR 320226.32;"
>
> (c) "1982 FIRST HALF TAX BILL CLASS III;" "IMPS ADDED;" "ADMIN. ERROR;" "TOTAL ASSESSMENT AT MARKET VALUE 20797000;" "FIRST HALF 221488.05;" "SEP 15 81 FULL YEAR 44297610."

The trial court pointed out in its opinion that on or about July 15, 1982, the assessment record card for the property was changed by the addition of a notation that an omitted property assessment had been made for the second half of tax year 1980, as well as for tax years 1981 and 1982. The trial court noted further that in trial testimony, Klugel stated that the notation as to tax year 1980 should have been for the full year. We add that this notation was made pursuant to Robert King's October 19 letter, and expressly reflected that improvements had been placed on the assessment roll.

$320,226.32 for 1981—on December 31, 1981, as permitted by the Department.[13]

After receipt of the Department's October 19 letter, the taxpayer, through counsel, filed an administrative appeal from the § 47-829 supplemental assessment which had already been withdrawn. A hearing on the appeal was held before the Board of Equalization and Review on November 19, 1981, at which the District argued that the Board was without jurisdiction to hear the appeal because the assessment had been withdrawn. By a letter dated December 7, 1981, the Board informed the taxpayer that it would take no action on the appeal for the reason advanced by the District at the November 19 hearing.

In January 1982, the taxpayer instituted this litigation by filing in the Tax Division of the Superior Court a petition for refund of real estate taxes in the amount of $137,561.10 for tax year 1980 and $320,226.32 for 1981 which had been paid pursuant to the District's omitted property assessment.[14] In alleging that the assessment and related tax billings constituted "illegal, invalid exactions," the taxpayer in its refund petition made several contentions, each of which is now advanced in one form

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[13] As we have stated, this dispute involves the omitted property assessments for the 1980 and 1981 tax years. While the taxpayer was notified that such an assessment was being levied also for 1982 [see notice quoted in part in text, *supra*], it seems the taxpayer successfully challenged the 1982 assessment (on grounds unknown to us) in a separate but related case before the Tax Division.

[14] The taxpayer notes in its brief that it filed in the Tax Division a separate petition challenging the actual valuation amounts of the assessments for the 1980 and 1981 tax years. Action on this petition is being held in abeyance pending the final disposition of the instant appeal.

or another on this appeal. The gravamen of its petition, though, was that because the existence of the subject improvements was known to the District in 1977, as well as on each valuation date for annual assessment for tax years 1980 through 1982, the improvements were not "omitted" from assessment within the context of § 47-831. The taxpayer contended, therefore, that those original valuations ascribed to the property constituted final and fully-informed assessments.

In February 1982, the District answered the taxpayer's petition, denying its material allegations, and then moved for summary judgment on the theory that, as a matter of law, it properly availed itself of § 47-831 to retroactively assess the property since no value was attributed to improvements for the tax years in question, even though *id.* § 47-821 (a) requires that an assessment be made for all real property, "identifying *separately* the value of land and improvements thereon." *1111 19th Street Associates v. District of Columbia*, *supra*, 112 Daily Wash. L. Rptr. at 1321 (emphasis supplied). The trial court issued a comprehensive opinion and order upholding the omitted property assessment under § 47-831 for tax years 1980 and 1981.

In its opinion and order, the trial court viewed the central issue of this case to be "whether the valuation of land but not improvements constituted [final] assessment of the subject property in light of the omitted property statute." *Id.* The significant facts in this regard, the court observed, "are that the District's record did contain clear evidence of the construction and existence of improvements yet only the land was assigned a value for the tax years in issue." *Id.* With this apparent contradiction in mind, the trial court reviewed the statutory scheme for assessments in the District and

underlying policy considerations, and then examined pertinent decisional law in this jurisdiction and elsewhere. *Id.* at 1321-22. The court concluded that in determining whether property was "omitted" from assessment within the meaning of § 47-831 the dispositive consideration is whether the property truly escaped assessment (and therefore taxation), such as where improvements were not valued due to clerical error or oversight, rather than simply having been reassessed on the basis of a new judgment as to valuation. *Id.* at 1322.

The trial court concluded there was no previous exercise of judgment on the value of the improvements, stating:

> What is important is that in valuing the subject property for the years in question, the assessor did not make any use of information relating to construction in the Department's own records. The assessment record contains notations that a building was under construction on June 20, 1978, and November 20, 1978, was 50 percent complete by June 15, 1979, and was 100 percent complete by May 29, 1980. Yet no value whatsoever was assigned to improvements. Nor is there any evidence that the responsible assessor considered assigning a value to them and declined to do so. The District's effort in making an omitted property assessment was not with the intent to raise the amount of an assessment deemed to be too low in value. The facts indicate that the construction and existence of improvements simply had not been noticed by the assessor charged with valuation for tax years 1980 and 1981. This court cannot conclude that this is a case involv-

> ing a previous exercise of judgment concerning improvement value.

Id. The court held that assessment of the taxpayer's office building improvements under § 47-831 was proper.[15] This appeal followed.

II.

The principal contention here is that the taxpayer's office building was unlawfully back-assessed as omitted property under § 47-831 because the District had once and finally assessed the property in its entirety for the 1980 and 1981 tax years, and had done so with knowledge of the construction and completion of the office building. The taxpayer submits that the property escaped neither assessment nor taxation, citing among other evidence the fact that "[b]eginning in 1977 and continuing to 1980, the owner was constructing the improvements on the property, opening the building for tenants and keeping the District fully informed [of this] including the voluntary notice to the District that the building had been opened so that all income data reporting requirements could be satisfied." The taxpayer adds that "[d]uring this same period, the District was periodically and continuously inspecting the property, reviewing the construction progress, establishing assessments based on all known factors and determining not to make any supplemental assessments." Hence, the taxpayer maintains that the improvements were not omitted from assessment, but rather were assigned a zero valuation. Alternatively, it seems, the taxpayer suggests that the District actually took into consideration the value of

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[15] The trial court subsequently denied the taxpayer's motion for reconsideration which raised some of the contentions we consider to be without merit in note 20, *infra*.

the office building when it assessed the property, as evidenced by the increases in the property's assessment from $1,444,300 for tax year 1978 to $3,588,715 for 1979, $4,715,100 for 1980 and $5,762,900 for 1981. However, against either view we find more convincing the District's argument, accepted by the trial court, that only the taxpayer's land was assessed and that § 47-831 could therefore be used to correct the District's inadvertent failure to initially consider the improvements in arriving at the property's assessment valuation.

Section 47-831, a statute which has been on the books in virtually its present form since 1894,[16] provides as follows:

> Omitted properties; void assessments; notice and appeal.
>
> If the Department of Finance and Revenue shall learn that *any property liable to taxation* has been *omitted from the assessment* for any previous year or years, or has been so assessed that the assessment made was void, it shall be a duty at once to reassess this property for each and every year for which it has *escaped assessment and taxation*, and report the same, through the Assessor, to the Collector of Taxes who shall at once proceed to collect the taxes so in arrears as other taxes are collected: Provided, that no property which has *escaped assessment and taxation* shall be liable under this section for a period of more than 3 years prior to such assessment, except in the case of property involved in litigation. In addition to the duties of the Assessor hereinbefore provided, it shall be the duty of the Assessor upon reassess-

[16] *See* Act of August 14, 1894, 28 Stat. 284, ch. 287 § 12.

> ment as herein provided to notify the taxpayer by writing of the fact of such reassessment. Any person aggrieved by any reassessment made in pursuance of this section may, within 6 months after notice of said reassessment, appeal from said reassessment in the same manner and to the same extent as provided in §§ 47-2403 and 47-2404. (Emphasis supplied.)

Our inquiry focuses on whether the taxpayer's improvements constituted "property liable to taxation" which was "omitted from the assessment" so that it "escaped assessment and taxation." Ultimately, this inquiry involves whether the property, under the guise of having been omitted, was simply reassessed based on a new judgment as to its valuation. For "[t]he rule approved by the great weight of authority in this country is that the power to assess 'omitted property' does not carry with it the power to revalue property already assessed." *Hunt v. District of Columbia*, 71 App. D.C. 143, 145, 108 F.2d 10, 12 (1939) (citations omitted). Thus, to sustain an omitted property assessment under § 47-831,

> "It must appear that the property itself had not been assessed at all . . . . It is not sufficient that the assessors, through lack of information or otherwise, have erred in their judgment of the quantity, quality, or value of the thing assessed. *Dresden v. Bridge*, 90 Me. 489, 38 A. 545 (1897). If the assessors have once assessed . . . that assessment cannot be revised by a supplemental assessment."

Hunt v. District of Columbia, *supra*, 71 App. D.C. at 146, 108 F.2d at 13 (quoting *Sweetsir v. Chandler*, 98 Me. 145, ——, 56 A. at 584, 586 (1903)).

It is clear to us that the taxpayer's office building was "omitted" from the 1980 and 1981 assessments and consequently "escaped" assessment and taxation for those years, as these terms are ordinarily used. The omission of the improvements (the building) from assessment is apparent in the Department's failure to indicate any office building valuation on the permanent assessment record card for the property or the notices of annual assessment sent to the taxpayer. As we related earlier, the assessment record card for tax years 1979 to 1982, inclusive, and the annual notices for tax years 1980, 1981, and 1982, reflected that the property's final assessed value each year had been attributed solely to the land: the spaces corresponding to the improvements category on the record card were *left blank*, as were the spaces on the assessment notices corresponding to the "building" legend.

While this evidence is uncontroverted, the taxpayer would have us view as compelling the evidence on the Department's cognizance of the improvements' construction and completion. There is clear proof the Department was aware of the improvements when it assessed the property for the years in question, says the taxpayer, and this supports the inference that the Department actually considered the improvements in making each assessment and either ascribed them a zero valuation or some valuation as reflected by the yearly increases in the property's total assessment from 1979 through 1981. Of course, if this were true, the omitted property assessment here might be considered tantamount to the revaluation of property already assessed and therefore would fall under *Hunt v. District of Columbia.*

Some Department employees unquestionably had information respecting the taxpayer's improvements when it originally assessed the property for the tax years 1980

and 1981. This is evident enough from the notations periodically made in the Department's assessment record file, such as the entry "100% complete . . . 5/29/80" on the property's construction permit card.[17] But, as the trial court aptly observed, there is no indication that the Department ever made use of such information in arriving at a final assessment, or that it contemplated doing so but declined to do it. The indication more compellingly points instead to an unwitting omission by the assessor charged with appraising the taxpayer's property. It cannot be said, therefore, " 'that the assessors, through lack of information or otherwise, have erred in their judgment of the quantity, quality, or value of the thing assessed.' " *Hunt v. District of Columbia, supra*, 71 App. D.C. at 146, 108 F.2d at 13 (quoting *Sweetsir v. Chandler, supra*, 98 Me. at ——, 56 A. at 586).

Contrary to the taxpayer's assertion, the Department's failure to assign any value to the improvements on the assessment record card and annual notices of assessment does not, in our view, evidence simply the Department's ascription of a zero valuation to the improvements. D.C. Code § 47-821 requires the Mayor to "assess all real property, *identifying separately the value of land and improvements* thereon . . . ." (Emphasis supplied.) The statute pertaining to assessment notices, *id.* § 47-824 (2) (1981), calls also for identification of the assessed

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[17] It is possible, though, that the Department received mixed signals about the taxpayer's improvements. According to the notations made on the construction permit card, the improvements were 50 percent complete by June 15, 1979, and 100 percent complete by May 29, 1980. Yet, as we noted above, the taxpayer's management agent notified the Department by letter in April 1980 that the property was "opened in mid-1979." Parts of the building conceivably may have been opened before construction on it was fully completed.

value of both the land and improvements. Hence, one would naturally expect the Department to have documented zero valuation for the tax years in question in one of the two ways it did for tax year 1978 when the building truly had no value because construction on it had not yet commenced: on the assessment record card containing tax year 1978 entries (*see supra* note 3) the building's value is reflected numerically in one place as "0," and elsewhere with a line drawn through a space pertaining to improvement assessment.

Nor do we accept that the increases in the property's total annual assessment—from $1,444,300 for tax year 1978 to $3,588,715 for 1979, $4,715,100 for 1980, and $5,762,900 for 1981—reflects that the District actually valued the taxpayer's improvements in arriving at the final assessments. While these increases are substantial, it is well-known that the value of land at such a precious commercial location as 1111 19th Street, N.W., increased markedly, especially in those inflationary years.[18]

For these reasons, we believe that the trial court did not err, and was not clearly erroneous in concluding that the improvements were omitted from the tax years 1980 and 1981 assessments in the same sense that they were inadvertently disregarded by the Department when it arrived at the property's final assessed valuation for each year. We turn now to the taxpayer's related contention, which involves purely a question of law, that the Department's assessment of the property itself precluded any subsequent assessment under § 47-831. In resolving this issue, our focus is on whether there was "any property

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[18] If the *amount* of the valuation increase for either land or improvements is questioned by the taxpayer, that is a different matter. *See* note 14, *supra*.

liable to taxation" omitted from the assessments within the meaning of the statute.

No one disputes that improvements on land are taxable as "real property," a term defined in D.C. Code § 47-802 (1) (1981) (formerly D.C. Code § 47-622 (Supp. V 1978)) as "real estate identified by plat on the records of the District of Columbia Surveyor according to lot and square *together with improvements thereon.*" (Emphasis supplied.) However, the trial court construed this definition, insofar as it bears upon the omitted property statute, as being susceptible to two interpretations:

> The first is that once a taxpayer has been notified of and paid annual real estate taxes on the property, no further real estate assessment may be made. Under this view, property can be considered "omitted" only if both land and improvements have escaped taxation. A different reading would be that the property tax obligation has been fulfilled only if the taxpayer has satisfied an assessment reflecting both the elements of "real property."

1111 19th Street Associates v. District of Columbia, supra, 112 Daily Wash. L. Rptr. at 1321. The trial court examined the intent of the legislature as reflected by the assessment statutory scheme and pertinent decisional law, and concluded that land and improvements are severable elements of real property for purposes of assessment such that either, without necessarily the other, could be deemed omitted property under § 47-831.

"The rule approved by the great weight of authority in this country is that the power to assess 'omitted property' does not carry with it the power to revalue property already assessed." *Hunt v. District of Columbia, supra,*

71 App. D.C. at 145, 108 F.2d at 12 (citations omitted).[19] This apparently is still the general view. But the actual controversies emanate from issues involving whether particular property had previously been assessed and therefore did not qualify as "omitted property." Nationally, there is some split in the authorities on these problems involving application of that general view.[20]

We agree with the reasoning of the decisions which may be said to be headed by *Korash v. Mills*, 263 So.2d 579 (Fla. 1972).[21] In *Korash*, the assessor had failed to bill the taxpayer for property taxes on a newly constructed improvement (a motel) on his property and, instead, had billed the land as though still vacant. Upon later discovering the mistake, the taxpayer was back-taxed one year on the value of the improvement (the motel). It appears that, administratively, the property record card on the valuation of the bare land had become separated from another card on which the valuation of the new motel improvement was being noted for the first time.

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[19] That case involved taxation of personal property in the District of Columbia which was previously assessed and then revalued by the District on the strength of a new Corporation Counsel ruling. It does not approach this case factually.

[20] Appellant refers us to *District of Columbia Redevelopment Land Agency and Bressler and Reiner, Inc. v. District of Columbia*, 106 Daily Wash. L. Rptr. 793 (May 2, 1978), as persuasive authority but that case is distinguishable. For example, the court there found that "this is not a case where an assessment was never made on the improvements." *Id.* at 797. Here, an assessment was never made previously on the improvement, a crucial factual distinction.

[21] Appellant is mistaken in stating that *Korash* does not accurately reflect Florida law. *See, e.g., Straughn v. Thompson*, 354 So.2d 948 (Fla. Dist. Ct. App. 1978); *Underhill v. Edwards*, 400 So.2d 129 (Fla. Dist. Ct. App.), *cert. denied*, 411 So.2d 381 (Fla. 1981).

The court stated that the "back assessment" was "in fact the initial and original assessment never theretofore assigned to the principal value of the property, a new $650,000 motel. There has been no reevaluation, no recalculation, and no reassessment of the property in this sense." *Id.* at 581. The court noted that "[i]f it were only for the purpose of an increase in the valuation of the total property," *id.* at 580, the result would be different.

The court said that, in relation to other decisions of the court, "the increase has been an attempted increase in *amount only* (after an assessment of the improvement for a total lesser *amount*) and not instances where the entire improvement was skipped and failed to be noted at all for taxation because of error or oversight as in the present case." *Id.* at 580-81. The court indicated its awareness of the need for a cut-off point on certification of the tax role, but said the court, a change reevaluating the amount will not be allowed. But "[i]f there is no new judgment being exercised, and property not theretofore included is just late in being enrolled and billed . . . it is a proper assessment and is payable . . . as 'escaped' property." *Id.* at 581. There had "never been any change in the tax assessor's judgment." *Id.* at 582. The *Korash* court adverted to *Markham v. Friedland*, 245 So.2d 645 (Fla. Dist. Ct. App. 1971), which it said involved:

> the unusual circumstances of a difference in *judgment* by successive tax assessors, one placing a partially completed structure on the tax roll as "substantially complete" and then "after very careful consideration" striking it; the other belatedly in 1969 (after certification) trying to add the improvement as "85% complete." This falls within the "judgment exercised" theory described *sub judice*, resulting in a rare instance of

> precluding the back assessment of an "omitted improvement" because it really had not escaped consideration. We do not see this result as inconsistent with our view.

Korash v. Mills, supra, 263 So.2d at 581.

The court concluded that the case it was deciding (*Korash v. Mills*), upheld the basic purpose of taxation:

> that all taxpayers share in proportion to their assessments, the support of their government and the protection and services afforded to their property and to themselves, and that none bears an added or unfair burden by reason of other taxpayers not paying their just share. (Footnote omitted.)

Id. at 582.

We consider *Korash* to be sound law and it accords with our view of the underlying principle in this case.[22]

There is other authority on this issue which, generally speaking, views *any* subsequent increase in a tax bill on property, for whatever reason, as being a reevaluation and therefore impermissible, *e.g., Davidson v. Franklin Avenue Investment Co.,* 129 Minn. 87, 151 N.W. 537 (1915); *Leyh v. Glass,* 508 P.2d 259 (Okla. 1973).[23] We do not subscribe to the basic reasoning of those cases. For the most part, they would substantially relegate the

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[22] *Korash v. Mills,* has also been favorably considered outside of Florida, *e.g., Okland v. Bilyeu,* 359 N.W.2d 412 (Iowa 1984); *Evans Product Co. v. Missoula County,* 201 Mont. 377, 654 P.2d 523 (1982).

[23] Others cited to us by appellant contain material factual differences, *e.g., Block Pitt Invest. v. Assessor of Bernalillo County,* 86 N.M. 589, 526 P.2d 183 (1974).

"omitted property" statutes to obscurity, as a matter of reality.

Appellant would have us apply the view that where language in a levying statute is doubtful, the doubt must be resolved in favor of the taxpayer, citing a line of cases headed by *Gould v. Gould*, 245 U.S. 151 (1917), and *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932). Both parties refer us to a widely acknowledged authority on statutory construction SUTHERLAND ON STATUTORY CONSTRUCTION (4th ed.). Appellant argues that we should follow the rule which provides that tax laws should be strictly construed against the state and in favor of the taxpayer. *Id.* at § 66.01. If the statute is ambiguous, says appellant, it must be construed in favor of the taxpayer, under the authority of *Gould v. Gould* and *Miller v. Standard Nut Margarine Co.* The government, on the other hand, refers us to SUTHERLAND, where he states:

> It has been declared that "[T]he power to assess property is a summary one, and . . . in order to secure uniform and just taxation, which the law intends, and to protect the state's revenue against a dishonest evasion of the law, and also to protect the honest taxpayer, it is necessary that tax laws be liberally interpreted, in aid of the taxing power." SUTHERLAND STAT. CONST. § —— (4th ed.) (footnote omitted).

To this, appellant responds that the text was there referring to collection of taxes, not imposition of taxes, and that the rule relating to imposition requires just the opposite, a "liberal construction in favor of the taxpayer" standard.

Turning to this case, there is no doubt from the face of the notice of assessment sent to the taxpayer that the

land was assessed and the office building (improvement) was not assessed by the District of Columbia. The assessment on the building was left blank on the card sent to the taxpayer.[24] Of that there is no question. Consequently, there is, and was, no doubt that the office building had escaped taxation. That particular property had been omitted from the separate "improvement" assessment. This brings us to the ultimate question here.

The law in this jurisdiction requires the Mayor to "assess all real property, identifying *separately the value of land and improvements* thereon, and administer and collect the real property tax within the District." D.C. Code § 47-821 (a) (1981) (emphasis added). As indicated, the District omitted to place a value on the existing building (improvement) on the land. The taxpayer was aware that an assessment for this downtown office building (1111 19th Street, N.W.) was omitted, and a hefty tax was thus erroneously not to be charged on this tax account. Due to the error, for that period the taxpayer escaped substantial taxation and this was readily apparent to the taxpayer.

Under the circumstances of this case, we consider that under the statute (D.C. Code § 47-831 (1981)), the office building here was "property liable to taxation," but "ha[d] been omitted from the assessment," *id.*, for a previous year. Furthermore, on these facts it was plain to the taxpayer that a considerable tax was justly owing and was inadvertently not being collected by the District of Columbia government.

If a lot has an improvement on it, the total property consists of land and an improvement. If we speak only

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[24] *See* note 14, *supra*, relating to the separate proceeding pending in relation to the amount of the annual assessments.

of the land, we are not addressing the property in its totality as it has two segments, which are required by statute in this jurisdiction to be assessed, the land and the improvement. If one segment (the office building) has been plainly omitted from assessment, then property has been omitted. As stated, the statute requires that the land and improvement be separately assessed. Otherwise, the property in its totality has not been assessed until the land and improvement have each been assessed. The property has not truly been assessed, as there is property (the building) omitted from assessment, under the statute.

Appellant's argument is that the "assessor had the opportunity to consider the improvements or any other relevant facts on the annual valuation date and having done so, could not later change the assessment based on the same facts known when making the annual assessment." There is the heart of the matter. Appellant views this as a change of judgment by the government. The government, on the other hand, in effect, says the statute is designed to enable correction of a prior mistake, a mistaken omission.

As we have indicated, in this jurisdiction, land and an improvement thereon (a building) are separately assessed. The Mayor is required to "assess all real property, identifying separately the value of land and improvements thereon . . . ." D.C. Code § 47-821 (a) (1981). The Mayor is also directed each year to "compile" and "place in a book, known as the preliminary assessment roll, the . . . value . . . of the land and improvements of all real property . . . ." D.C. Code § 47-823 (1981); and taxpayers are required to be informed, separately, of value of the land and improvements. D.C. Code § 47-824 (1981).

Here, the government clearly omitted by mistake to assess the office building and left the appropriate box for the building assessment blank on the notification to the taxpayer. We should think it is apparent that this was an error made, not a judgment reached. It was therefore within the reach of the "omitted property" statute.

We agree with the decision reached by the trial court. This result is in furtherance of the fair "sharing of the financial burden of the government." D.C. Code § 47-801 (1981). This is a goal which should be sought. The outcome of this case is legally and equitably justified.[25]

Affirmed.

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[25] The taxpayer also contends, as he did below, that the District's assessments under the omitted property statute were untimely. As the trial court observed, the statutory three-year limitation period contained in § 47-831 runs from the date the property escaped assessment and taxation—here, January 1, 1979, the valuation date for tax year 1980. *1111 19th Street Assoc. v. District of Columbia, supra,* 112 Daily Wash. L. Rptr. at 1323 n.3. The omitted property assessments of the taxpayer's improvements were made in late 1981, clearly before expiration of the statutory period and were not untimely.

The taxpayer also contends that (1) the trial court erred in failing to consider its "substantial" due process and equal protection claims under the constitution, and (2) the assessments here were impermissibly made at the direction of the Office of Corporation Counsel. These contentions are without merit.

Given the result of this appeal, we need not reach the taxpayer's last contention that it is entitled to an award of attorney fees and interest on the taxes paid.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 85-56

1111 19th STREET ASSOCIATES, TAX3096-82
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

BEFORE: *Pryor, Chief Judge; Nebeker, Mack, Newman, Ferren, *Belson, Terry, Rogers, and Steadman, Associate Judges; and *Gallagher, Senior Judge.

FILED JUNE 11, 1987

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, the opposition and the reply thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Copies to:

Honorable Iraline G. Barnes

Clerk, Superior Court

Gilbert Hahn, Jr., Esquire
1155 - 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

Charles L. Reischel, Esquire
Deputy Corporation Counsel

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Tax Division

1111 19th Street Associates
Petitioner,

Tax Docket No. 3096-82

v.

DISTRICT OF COLUMBIA
Respondent.

OPINION AND ORDER

This matter came before the court for trial on the merits December 13, 1983. The parties submitted proposed findings and conclusions on January 6, 1984.

The petition in this case challenges assessments made for tax years 1980 and 1981, characterizing improvements as "omitted property" within the meaning of D.C. Code §47-712 (1973), now §47-831 (1981). The petitioner's primary contention is that the assessments were improper in that the District government was aware of the construction and completion of improvements on the subject property. Despite this fact, at the time of the initial assessment the government failed to attribute any value for improvements. The subject property was then taxed as to land only. Petitioner then made the tax payment pursuant to the tax bill rendered, thus precluding reassessment. The respondent argues that the fact that there was no value attributed to improvements is indicative of an omission that may remedied under the statute.

The Court exercises jurisdiction over this case by authority of D.C. Code §11-1201 and 47-3305 (1981).

Upon consideration of the trial and record of this case, the court makes the following:

FINDINGS OF FACT

1. The petitioner is 1111 19th Street Associates, of which D.F. Antonelli is general partner, and is a limited

partnership organized under the laws of the District of Columbia.

2. Petitioner owns the subject property, consisting of real estate identified as Lot 90 in Square 140, with premises known as 1111 19th Street. Petitioner is obligated to pay all real estate taxes assessed against the property.

3. On or about March 1, 1979, petitioner received a notice of annual assessment for the subject property pursuant to D.C. Code §47-645 (1973), now §47-824, reflecting a valuation of $4,715,100 as of January 1, 1979. No appeal of the assessment was filed, and petitioner timely paid taxes in the amount of $86,286.34. The assessment record card did not show any value assigned to improvements for that tax year. The assessment record included notations that building plans were submitted February 7, 1977, the property was inspected December 17, 1977, and construction was in progress on June 20 and November 20, 1978.

4. On or about March 1, 1980, petitioner received a notice of annual assessment for tax year 1981 reflecting a valuation of $5,762,900.00 as of January 1, 1980. No appeal of the assessment was filed, and petitioner timely paid taxes in the amount of $122,749.78. The assessment record card did not show any value assigned to improvements for that tax year. Sometime between January 1, 1979, to January 1, 1980, the valuation dates for tax years 1980 and 1981, the following notation was made on the assessment record: "6-15-79 50% complete."

5. On or about March 1, 1981, petitioner received a notice of annual assessment for tax year 1982 reflecting a valuation of $5,762,900.00 as of January 1, 1981. No appeal was filed with respect to the assessment. Petitioner never received a tax bill based on the assessment, which would require a payment of $1222,749.78. Sometime between January 1, 1980, and January 1, 1981, the valuation dates for tax years 1981 and 1982, the following notation

was made on the Department's assessment record: "100% complete . . . 5/29/80."

6. On or about September 3, 1981, petitioner's management agent was notified by the agent for the lender-mortgagee[1] that the annual taxes listed for the first half of tax year 1982 were in the amount of $444,675.84.

7. On September 11, 1981, petitioner received a "Notice of Property Assessment for Tax Year 1982," dated September 8, 1981. The notice indicated an increase in the tax year 1982 assessment, from $5,762,900.00 to $20,876,800.00 and stated, "Reason for Change: Permit Work." The notice informed petitioner that an appeal to the Board of Equalization and Review could be filed "between September 1 and September 30," a right provided by Section 47-710, which authorized supplemental assessment based upon new structures erected or roofed since the previous assessment valuation.

8. Counsel for petitioner conferred with Robert L. Klugel, then Acting Supervisor of the Department of Finance and Revenue's Standards and Review Unit. They discussed the possibility of restoring the assessed value to the original tax year 1982 figure contained in the notice of assessment that petitioner had received in March. This discussion was pursued because the facts indicated that no new construction had occurred since the January, 1981, valuation date.

9. On September 16, 1981, Mr. Klugel wrote to Assistant Corporation Counsel Richard L. Aguglia, chief of the Taxation Section, requesting an opinion as to whether an omitted property assessment pursuant to D.C. §47-712 (1973) would be justified for the subject property. Mr. Klugel inquired whether such an assessment could be made

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[1] This agent performs the function of maintaining escrow funds and issuing payment of real estate taxes for the subject property from such funds.

after withdrawal of an untimely supplemental assessment made pursuant to Section 47-710 (1973). After responding to the request, counsel for the respondent conferred with Mr. Klugel subsequently, a determination was made to withdraw the purported supplemental assessment and impose an omitted property assessment to take account of the value of improvements.

10. Petitioner on November 12, 1981, received by mail a letter dated October 19, 1981, from Robert L. King as Acting Associate Director of the Department of Finance and Revenue. The letter stated that the notice of supplemental assessment for tax year 1982 pursuant to Section 47-710 was being withdrawn, and further that an omitted property assessment was being levied. Specifically, petitioner was informed that the Department had "concluded that the improvements to the property have *never* been assessed since construction began in 1977. Therefore, pursuant to §47-712, we have assessed the improvements to the subject property for tax years 1980, 1981 and 1982." Tax bills were enclosed, indicating that payment would be required within 30 days. Subsequently, extensions were obtained from the Department of Finance and Revenue. Petitioner paid the disputed taxes on December 31, 1981, as permitted by the Department.

The bills received with the October 19 letter contained the following language:

(a) "Payer's Receipt"; "Fiscal Year 1980"; "Total Assessed Value 12,232,100"; "Total Tax 137,561.10";

(b) "1981 SECOND HALF TAX CLASS III"; "IMPS ADDED"; "ADMIN. ERROR"; "TOTAL ASSESSMENT AT MARKET VALUE 20, 797,000"; "FIRST HALF 22,148,805"; "SEP 15 81 FULL YEAR 32,022,632";

(c) "1982 FIRST HALF TAX BILL CLASS III"; "IMPS ADDED"; "ADMIN. ERROR"; "TO-

> TAL ASSESSMENT AT MARKET VALUE 20,797,000"; "FIRST HALF 22,148,805"; "SEP 15 81 FULL YEAR 44,297,610." (Punctuation added.)

After receipt of the Department's letter, petitioner, through counsel, filed an administrative appeal from the Section 47-710 assessment which had been previously noticed and withdrawn. (A filing date of September 10, 1981, was used.) At an administrative hearing held November 19, 1981, counsel for the District stated that the Section 47-710 assessment had been withdrawn and argued that the Board lacked jurisdiction over the appeal. By letter dated December 7, 1981, the Board informed Petitioner that it would take no action on the administrative appeal in reliance on the District's position.

On or about July 15, 1982, the actual assessment record card was changed by addition of a notation that an omitted property assessment had been made for the second half of tax year 1980, and for tax years 1981 and 1982. In trial testimony, Mr. Klugel stated that the notation as to tax year 1980 should have been for the full year.

The instant petition was filed timely in the Tax Division. The testimony of Mr. Klugel established that the petitioner had filed all appropriate documents with the District government, including a construction permit which was noted and attached to assessment card.

ANALYSIS AND CONCLUSIONS

Resolution of this case principally requires interpretation of D.C. Code §47-712 (1973), now §47-831 (1981) [language change in brackets], governing taxation of "omitted" property, which provides:

> *If* the board of assistant *assessors* [Department of Finance and Revenue] shall learn that any *property liable to taxation has been omitted* from

> the assessment for any previous year or years, *it shall be their duty at once to reassess this property* for each and every year for which it escaped assessment and taxation, and report the same through the assessor, to the collector of taxes who shall at once proceed to collect the taxes so in arrears as other taxes are collected: *Provided,* That *no property which has escaped assessment and taxation shall be liable* under this section *for a period of more than three years prior to such assessment,* except in the case of property involved in litigation. In addition to the duties of the assessor hereinbefore provided, it shall be the duty of the assessor upon reassessment as herein provided to notify the taxpayer by writing of the fact of such reassessment. (Emphasis added.)

The provision further states that any person "aggrieved" by "reassessment" pursuant to this section may appeal in the manner provided by D.C. Code §47-2403 and 47-2404 (1973), now §§47-3303 and 47-3304 (1981).

The Court must determine in this case whether—as the District contends—The District properly characterized the subject property as "omitted," or whether—as petitioner argues—the property had been finally assessed and taxed in view of the statutory scheme. The significant facts are that the District's records did contain clear evidence of the construction and existence of improvements, yet only the land was assigned a value for the tax years in issue.

Before turning to the question stated, the Court finds it useful to review briefly the statutory scheme to establish valuation of real estate for assessment purposes. The process is described generally in D.C. Code §47-821 (a) (1981), as follows:

> The Mayor shall assess all real property, identifying separately the value of land and improvements thereon, and administer and collect the

> real property tax within the District. The Mayor shall also notify owners of real property of assessments and of appeal procedures. In addition, he shall maintain adequate records relating to the administration of the real property tax in the District, and provide appropriate public information concerning such tax.

More specifically,

> (a) The assessed value of all real property shall lbe listed on the assessment roll for real property taxation purposes annually as provided in §§47-820 to 47-828. The assessed value for all real property shall be the estimated market value of such property as of January 1st of the year preceding the tax year, as determined by the Mayor. In determining estimated market value for various kinds of real property the Mayor shall take into account any factor which might have a bearing on the market value of the real property. . . . Assessments shall be based upon the sources of information available to the Mayor which may include actual view.
>
> (b) All real property shall be assessed no less frequently than once every 2 years, and as soon as practicable such assessment shall be made annually. [F]or fiscal year 1978, and for each fiscal year thereafter, all real property shall be assessed on an annual basis.

D.C. Code §47-820 (1981).

Thus, taxable properties are to be identified and their assessed value listed on assessment rolls, which along with data used for assessment are required to be made available for public inspection. D.C. Code §§47-820, -822, -823 (1981). Notices of annual reassessment are to be conveyed to the taxpayer no later than March 1st of each year, including

the reason for any changes in assessment and a statement of applicable appeal procedures. D.C. Code §47-824 (1981).

New structures, and additions or improvements of pre-existing structures which vary the basis or provide a new basis for taxation, are to be listed on July 1st of each year and valued for purposes of supplemental assessment. D.C. Code §47-829 (1981). Further pursuant to that provision, an assessment must be reduced after property has been damaged or destroyed. *Id.* New structures completed during a tax year are to be identified and assessed prior to each January 1st in order to impose a "second half" assessment. D.C. Code §47-830 (1981). Finally, any property found to have been "omitted from assessment," or to have "escaped taxation" is required to be taxed as soon as possible after the determination is made, with certain exceptions related to the passage of time not applicable here. D.C. Code §47-821 (1981), formerly §47-712 (9173).

Referring to the question presented, the central issue of this case is whether the valuation of land but not improvements constituted assessment of the subject property in light of the omitted property statute.

The term "real property" is defined by D.C. Code §47-820 (1981) as *"real estate* identified by plat on the records of the District of Columbia Surveyor according to lot and square *together with improvements thereon."* (Emphasis added.) From this wording, two interpretations are possible. The first is that once a taxpayer has been notified of and paid annual real estate taxes on the property, no further real estate assessment may be made. Under this view, property can be considered "omitted" only if both land and improvements have escaped taxation. A different reading would be that the property tax obligation has been fulfilled only if a taxpayer has satisfied an assessment reflecting both the elements of "real property."

Because the literal approach to the statute does not resolve the issue, the Court resorts to the intent of the

legislature as reflected by the statutory scheme and previous judicial interpretations of the same or similar language.

First, it seems apparent that the system of assessment established by statute is designed to inform the taxpayer fully and timely of tax obligation and their basis. This purpose is evident from the statutory requirements of notice and opportunity to inspect documents, described earlier. Second, the statute also is intended to provide finality. It is on this ground that petitioner persuasively argues no futher assessment is permitted once a taxpayer has received notice of assessment setting forth the valuation, then obtained and paid the tax bill without appeal. With respect to both goals, notice and finality, there are public interest considerations which may compete from time to time, chiefly arising from the government's obligation to obtain tax revenue, to protect against taxpayer avoidance of the tax obligation, and to assign equal values to like properties.

Judicial interpretations of the various omitted property statutes have taken account of the above-mentioned policies, as reflected by precedent in in the District of Columbia and in jurisdictions with similar statutes.

No specific ruling in District of Columbia has interpreted the omitted property statute's interpretation in precisely the context presented by the instant case. One local court opinion contains extensive discussion of the matter in *dicta*.[2] *District of Columbia Redevelopment Land Agency v. District of Columbia,* Tax Docket No. 2298, 106 D.W.L.R. 793 (D.C. Super. Ct., March 13 1978) (Penn,J.).

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[2] Although the Court is not required to follow *dicta* in prior opinions which foreshadow the resolution of an issue, the Court may by independent analysis reach the same conclusion, land may be persuaded by the merits of previous, non-binding statements of the Court. *See Punch v. United States,* 377 A. 2d 1353, 1360 (D.C. 1977). *Accord, Ceco Corp. v. Colmean,* 441 A. 2d 940, 953 (D.C. 1982)

The *D.C. RLA* case concerned an addition to existing improvements which had not been calculated into the value assigned for assessment purposes. The Court there held that the District could not rely upon the omitted property provision to retroactively increase the assessment by assigning a higher value to improvements, thereby accounting for the value of the addition.

Judge Penn distinguished the case before him from a fact situation in which no value—rather than a low value—had been assigned to improvements. He stated that if assessment records demonstrated that improvements had not been valued at all, then an omitted property assessment could be upheld. Judge Penn's apparent rationale was twofold. First, the absence of any improvements value on the face of assessment records would provide notice to the taxpayer of an omission. Second, the record would contain the type of omission reflecting a lack of prior judgment by the assessor. Later assessment consequently would represent an original valuation, rather than a prohibited revaluation based upon further exercise of judgment. As Judge Penn stated, "A change in judgment does not open the door to the making of an escaped property assessment."Id. at 797.

Another *D.C. RLA* case confronted the judgment question in a context closer to the facts of the instant case, but involving the additional and supplemental tax provisions. *D.C. RLA v. District of Columbia,* Tax Docket Nos. 2460, 2461, 2462 and 2517, 107 D.W.L.R. 949 (D.C. Super. Ct., April 27, 1979) (Penn,J.). That case involved the situation in which the proper construction permits had been obtained and, later, a certificate of occupancy had issue. The assessor was fully conscious of construction when it occurred. He made a "subjective judgment" to postpone assessment of added improvements, based on his personal interpretation of when the statute required an additional or supplemental assessment. *Id.* at 953. The later assess-

ments were ruled untimely and therefore invalid by Judge Penn, upon a finding that

> [t]*he assessor here waited until he felt the property's income was at a point where he could put on a "finished assessment"* but his actions were inconsistent with the statute and the regulations. . . . This court rules then that an assessment under Section 47-711 can only be made and must then be made when the property is "erected" or "roofed and under roof" . . . . when the Certificate of Occupancy for the entire structure is issued.

Id. (Emphasis added.)

Case authority from other jurisdictions similarly focuses on the concepts of taxpayer notice and the "judgment exercised" theory. Florida cases involve a statute comparable to the District's property statute, providing for taxation of "property"—defined as land and improvements—which has escaped taxation. In contrast is a Washington state provision from which case authority was cited in *D.C. RLA,* Tax Docket No. 2298. The Washington statute provides specifically for assessing improvements which have escaped taxation.

In *Korash v. Mills,* 263 So. 2d 579 (Fla. 1972), the assessment for the subject property did not increase from one year to the next, despite construction of a motel on the land in the intervening period. No value was placed on the improvements. The omission was attributed to clerical error; the assessment card containing a record of the bare land inadvertently became separated from a newer subsequent card noting the existence of improvements. Under those circumstances, the court found that a back assessment was not properly characterized as an impermissible "increase" in that it did not represent an assessor's "change in judgment." The court explained:

> We must keep in mind the distinction between changes and "miscalculations" by the assessor after tax roll certification, and the situation here where *there has been no billing at all on the improvement* .... which has been completely excluded from the tax roll.
>
> * * *
>
> *The "back assessment" here was in fact the initial and original assessment never theretofore assigned* to the principal value of the property, a new ....motel. There has been no reevaluation, no recalculation and no reassessment of the property in this sense.

Korash, 263 So. 2d at 581. (Emphasis added.)

A lower Florida court had made a seemingly contrary ruling the year before *Korash* was decided, holding that "improved land, taxed as unimproved land, had not escaped taxation and is not the same as "omitted property." *Markham v. Friedland,* 245 So. 2d 645, 648 (Fla. Dist. Ct. App. 1971). That court made clear, however, that the challenged assessment represented the assessor's attempt at exercising judgment differently than the previous assessor. The original levy represented a conscious determination that the improvements were not "substantially complete," as required for taxation. The next assessor, obviously viewing this determination as an error in judgment, attempted to compensate by making an omitted property assessment.

The court touched briefly on the scope of back assessment in answer to the argument that the landowner must have known no improvements value had been included and was therefore on notice of property having escaped taxation. The key concern was not whether tax had been avoided, but rather in what manner, the court determined. The lower court read the Florida statute authorizing omit-

ted property assessment to mean that "only clerical errors may be corrected and not mistakes of judgment."

A broader construction was contemplated in a local case involving an omitted property assessment challenge. *Trustees of St. Paul Methodist Episcopal Church v. D. C.*, 94 U.S. App. D. C. 78,81 (1954).The court observed that the case presented

> a serious question whether realty which has been duly determined to be exempt may later be assessed as omitted; for it was not overlooked by the authorities who made the original assessment of all taxable property, and was not omitted from that assessment through oversight or clerical error.

Id. at 81. (Emphasis added.)

The case was resolved without deciding that question, but the court's phrasing of the issue reveals an interpretation which would permit an omitted property assessment in the instant fact situation.

The *D.C. RLA* case, Tax Docket No. 2298, primarily relied on a Washington case with a comparable fact situation, *Tradewell Stores, Inc. v. Snohomish County*, 418 P. 2d 466 (Wash.1966). In *D.C. RLA* the assessor had failed to account for an addition to existing improvements and tried to compensate through an omitted property designation. In *Tradewell*, a new building replaced older structures that had been on the land, but for unknown reasons the higher value determined for the new building was not posted on assessment records. The *Tradewell* court emphasized that any taxable omission must appear on the face of the assessment roll, and that the omitted property assessment could not be employed to correct "[i]nappropriate" valuations. The impact of this approach was acknowledged when the *Tradewell* court stated:

> The fact that this interpretation allows a taxpayer to escape payment of taxes as a result of error or oversight of the assessor or even because of his inability to keep constantly informed of new construction .... is unfortunate, but is immaterial.

418 P. 2d at 467.

If adopted in this jurisdiction, such a view would not necessarily require the Court to invalidate the omitted property assessment made here. As observed in the above cited *D.C. RLA* opinion,

> In *Tradewell Stores, Inc.*, the official tax documents revealed that both land *and improvements* had originally been assessed for the taxable year, therefore it was impossible to determine, based solely upon those records, that the assessor had not taken the additional improvements into consideration when making the assessment. ... On the other hand, had the assessment in Tradewell Stores, Inc. been only on the land and had that fact been clear from the written record, as for example where the tax documents show a value assigned to the land but none to the improvements, then based upon that official tax record, the court could have found that the improvements had in fact escaped assessment.

85 D.W.L.R. 797. (Emphasis in original.)

Thus, consideration of the nature of the assessor's oversight, and whether there is notice of omission from the record, may lead the Court to uphold an assessment like the one in the instant case.

Under the District of Columbia tax statutes, the assessor was obligated to, within a designated period, consider information from the best sources, arrive at the approximate market value as of a date certain, identifying land and

improvement value separately, and levy a tax on the whole property based upon the valuation. If new construction occurred, the assessor was required to make supplemental assessment under D.C. Code §47-829, formerly §47-710, or second half assessment under §47- 830, formerly §47-711. As a general matter, it appears in the instant case that the District could and should have assessed the improvements earlier, under the above provisions. But this observation does not resolve the issue at hand. The district had conceded that it was too late to employ above-mentioned statutory provisions when the omitted property assessment was made. What is important is that in valuing the subject property for the years in question, the assessor did not make any use of information relating to construction in the Department's own records. The assessment record contains notations that a building was under construction on June 20, 1978, and November 20, 1978, was 50 percent complete by June 15, 1979, and was 100 percent complete by May 29, 1980. Yet no value whatsoever was assigned to improvements. Nor is there any evidence that the responsible assessor considered assigning a value to them and declined to do so. The District's effort in making an omitted property assessment was not with the intent to raise the amount of an assessment deemed to be too low in value. The facts indicate that the construction and existence of improvements simply had not been noticed by the assessor charged with valuation for the tax years 1980 and 1981. This Court cannot conclude that this is a case involving a previous exercise of judgment concerning improvements value.

Neither is this a situation in which notice to the taxpayer was lacking. Where the operable facts regarding taxability are apparent on the face of the record, the taxpayer should not be permitted to avoid his share of the tax burden by invoking the finality principle. This policy is not inconsistent with the rule that "[w]hen property has once been finally assessed it cannot again be assessed. It

is not the policy of the law to favor reassessments." *Tumulty v. District of Columbia,* 69 U.S. App. D.C. 390, 397 (1939) (omitted personal property assessment invalid where District failed to comply with statutory requirements of written notice to taxpayer)

The philosophy underlying the omitted property provision is one of fairness in apportioning the tax burden, a concept broadly articulated in D.C. Code §47-801 (181), which provides in relevant part:

> It is the intent of Congress to revise the real property tax in the District of Columbia to achieve the following objectives: (1) Equitable sharing of the financial burden of the government of the District of Columbia . . . .

It follows logically that a taxpayer, having notice that his property has escaped taxes which would properly be due, should not stand to benefit by avoiding payment of an equitable share of the tax burden.

In the instant case, where the omission was clear from the record—particularly the notice of assessment sent to the taxpayer—the Court cannot reward the taxpayer and punish the District for an error involving no new exercise of judgment by an assessor. The Court cannot impose on the taxpayer an affirmative duty to come forward with suspected errors by assessment authorities. Nonetheless, the Court receives compelling inequities as an inevitable result of the kind of case presented in this action. Here, the taxpayer accepted and paid an assessment which clearly reflected that property had escaped taxation. The taxpayer then proceeded to contest the government's correction of the error. Yet other property owners are required to pay real estate taxes reflecting the value of their property, including land and improvements.

Based upon a thorough review of the evidence and the governing statutes and policies in this case, the Court

concludes that the omitted property assessments for the subject property for tax years 1980 and 1981 were imposed validly.[3]

Wherefore, it is this 14 day of May, 1984, ORDERED that the tax year 1980 and 1981 assessments for the subject property made under authority of D.C. Code §47-712 (1973), now §47-831 (1981), be, and hereby are, affirmed.

/s/Iraline G. Barnes
JUDGE IRALINE G. BARNES

Copies to:

Gilbert Hahn, Jr., Esquire
Amram & Hahn
1155 15th Street, N.W., Suite 1100
Washington, D.C. 20005

Richard G. Amato, Esquire
Office of the Corporation Counsel, D.C.
1133 North Capitol Street, N.E., Room 238
Washington, D. C. 20002

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[3] Contrary to the petitioner's assertions, the omitted property assessment in this case was not untimely. The statutory three year limitation period runs from the date that the property escaped taxation—the time when the assessment that should have been made was not made. The earliest date on which improvements on the property may be said to have escaped tax liability would be January 1, 1979, the valuation date for tax year 1980. The notice of omitted property assessment was dated October 19, 1981 and received in November 1981, less than three years after the valuation date.

The Court finds it unnecessary to reach constitutional arguments advanced by the petitioner.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Tax Division

1111 19th Street Associates,
Petitioner,
v.
DISTRICT OF COLUMBIA,
Respondent.

Tax Docket No. 3096-82

Filed Dec. 10, 1984

ORDER

This matter comes before the Court upon petitioner's Motion for Reconsideration, the respondent's Opposition, and petitioner's Reply Memorandum. The Court is asked to reconsider affirmance by Order dated May 14, 1984, of assessments made for tax years 1980 and 1981 of real estate identified as Lot 90 in Square 140, with premises known as 1111 19th Street, N.W. With respect to this lot, the District successfully contended that the omitted property assessments for the subject property for tax years 1980 and 1981 were imposed validly.

Petitioner argues that, generally, equitable considerations do not exist in favor of the government. In opposition, respondent pointed out cases where the District of Columbia Court of Appeals applied equitable considerations in favor of the government to insure that taxpayers consistently complied with the District's laws. In reply, petitioner asserts these cases are inapplicable to its own. Petitioner writes that respondent mistakenly relied on cases which it thought demonstrated that equity had been applied favorably to the government "where the plain reading of the statute was favorable to the taxpayer." (Petitioner's Reply Memorandum at 3.) In fact, respondent did not mention anything about a literal reading of the statute; rather respondent merely was demonstrating that equitable considerations have been given to the government.

As discussed in the Order of May 14, 1984, the concepts of fairness and equity do indeed underly the omitted property provision. The Court then carefully weighed the equities with the evidence presented to it, and sees no reason now to disturb its determination that the assessments were properly imposed.

Petitioner also asserts several constitutional claims. Primarily, petitioner argues it was denied due process because it alone was "singled out" for an omitted property assessment when others in the same category and at the same time were not required to pay taxes on omitted property. The Court recognizes that equal treatment within a class is vital to an equitable administration of the tax laws. However, "taxpayers cannot avoid liability for a proper tax by showing that others have been treated leniently or erroneously. . . ." *Washington Theater Club, Inc. v. District of Columbia,* 311 A.2d 492, 495 (D.C. 1973); *See also Hanover Bank v. Commissioner of Internal Revenue,* 369 U.S. 672, 686 (1962). The Court remains convinced that the District's assessment results in an equitable portion of taxes that petitioner must pay and concludes that none of the arguments which petitioner raises reach constitutional proportions warranting reconsideration of the Court's decision. *Id.* at 672, 686.

Petitioner also raises in its Motion the question of the timing of the assessments. The Court reiterates that, contrary to petitioner's assertions, the omitted property assessment was not untimely. Improvements on the property may be said to have escaped taxation on January 1, 1979, the valuation date for tax year 1980. The notice of omitted property assessment was dated October 19, 1981, and received in November, 1981, and therefore the assessment came within the statutory three year limitation period.

Finally, petitioner asserts incorrectly, that there was an illegal delegation of authority to Corporation Counsel. When Corporation Counsel *suggested* that the Department

of Finance and Revenue invalidate the §47-710 assessment, it acted in its capacity as legal counsel only to the Department. It was this advice of Corporation Counsel that reassured the Department it could properly conduct an omitted property assessment under §47-712.

Wherefore, it is this 7th day of December, 1984, ——

ORDERED that petitioner's Motion for Reconsideration be, and hereby is denied.

/s/Judge Iraline G. Barnes
JUDGE IRALINE G. BARNES

Copies to:

Mary Kathleen Hite, Esquire
Amram and Hann
1155 15th Street, N.W., Suite 1100
Washington, D.C. 20005

Richard G. Amato, Esquire
Office of the Corporation Counsel, D.C.
1133 North Capitol Street, N.E., Room 238
Washington, D.C. 20002

Part of Lot 888 thru 895 + 899 ASSESSMENT RECORD CARD WASHINGTON, D. C.
for F.Y. 1903 COMMERCIAL

CARD NUMBER NO. OF

SQUARE	LOT	PREFIX	BUILDING CODE	NGH CODE	TAXABLE	EXEMPT	EXEMPT CODE	REASON CODE	TAX CODE	REVIEW YEAR	NAME OF BUILDING
140	90		54291	10	TX						

PROPERTY ADDRESS ~~1111 block of~~ 19th St. N.W. OWNER

BUILDING DATA		BUILDING COMPUTATIONS							CODE:	SITE DATA	
		DATE	CLASS	STORY	AREA/VOL.	INDEX	UNIT COST	REPL. COST	VALUE		
Bldg. Type										Zoning	C4
Bldg. Class										Use	
Bldg. Ground Area										Corner	
Story Height										Shape	
Gross Bldg. Area										Auth. FAR	10.0
Finished Area										Developed FAR	
[illegible] Area										Topography	Level
Net Rent Area										Assembly	Yes
Office										Lots	See below
Commercial		Net Condition (%)								Area	26,195
Ratio		Building Value (Rounded									
Efficiency %		LAND COMPUTATIONS							CODE:	NOTES:	Lot 888 thru 895 and
Basement		DATE	RATE	ADJUST	FRONT	DEPTH	AREA	VALUE			899, 901, 903 Duncan
Year Built		9-22-77		55.13			26195	1444130			of 2 ft from 26196 to 26195
Exterior Cond.											
Func. Utility											
Heating System											
Plumbing System											
Cooling System											
Wall Area Ratio		RECORD OF SALES									
Net Condition		DATE	AMOUNT	UNIT	RATIO	REMARKS					
Extras											
		BUILDING PERMIT ACTIVITY									
		DATE	PERMIT NO.	AMOUNT	DESCRIPTION						
		2-7-77	B254435		Build. Plan submitted						

ASSESSMENT RECAPITULATION								
TAX YEAR	78							
LAND VALUE	1,444,130							
BLDG VALUE	0							
TOTAL	1444130							
IMV	1444130							
ASSESSOR	See Instr. Newly							

140 90
1. SQUARE SUFFIX LOT

1,444,130
2. F.Y. 78 ASSESSED VALUE

3. IMPROVEMENT ASSM'T.

1,444,130
4. LAND ASSESSMENT

TX 55.13
5. ZONE TT ADJ. RATE

10 542900
6. N'BHD CODE USE CODE

7. F.Y. 78 REVISION

3588715
8. F.Y. 79 PROPOSED VALUE

9. IMPS. PROPOSED VALUE

10. LAND PROPOSED VALUE

137.
11. LAND PROPOSED A. R.

P-302-B (11-70) P-4771

DEPRECIATION	
Physical Deter	
Functional Obs.	
Economic Obs.	
Not Condition	

		EXTRAS
1		Swim Pool
2		Balcony
3		Patio
4		Sprinkler
5		Elevator
6		Fin Basement A.
7		Parking
8		Disposal
		Dishwasher
10		Incinerator
11		Freight Elev
12		Escalator

		SUPER-STRUCTURE
1		Rein Conc
2		Conc Blks
3		Brick
4		Frame
5		Other
		FOUNDATION
1	.	Concrete
2		Block
3		Brick
4		Other
		EXTERIOR WALLS
1		Curtain Cons
2		Stone
3	.	Brick
4		Glass
5		Alum
6		Block
7		Other
		INTERIOR WALLS
1		Plaster
2	-	Drywall
3	-	Wood Panel
4		Other
		CEILING
1		Exposed
2		Drywall
3		Plaster
4	✓	Acoustic
5		Other
		FLOOR
1		Concrete
2		Tile
3		Terrazzo
4		Hardwood
5		Other

		HEATING SYSTEM
1		Forced Air
2		Hot Water
3		Heat Pump
4		Other
		COOLING SYSTEM
1		Forced Air
2		Heat Pump
3		Wall Units
4		Other
		EXTERIOR CONDITION
1		Poor
2		Fair
3	.	Average
4		Excellent

APARTMENT UNIT INFORMATION

SIZE	NO. UNITS	NO. BATHS	NO. KITCH	SQ FT	RENT	INCOME
Bachelor						
Efficiency						
1 Bedroom						
2 Bedroom						
3 Bedroom						
4 Bedroom						
Other						
TOTALS						

PROPERTY SKETCH:

0140 SQUARE	0090 SUFFIX	52 LOT
10 NBHD CODE	5429164 USE CODE	
C4 TX ZONE TT	26195 AREA	
F.Y. 81 ASSESSMENT TOTAL 5,762,900		
IMPS.		
LAND 5,762,900		
220.00 ST. RATE	ADJ. RATE	
F. Y. 81 REVISION		
F.Y. 82 PROPOSED TOTAL 20,876,900		
IMPS REMOVED 347-710/711 9-16-81 IMPS. 15,113,900		
LAND 5,762,900		
220.- ST. RATE	ADJ. RATE	

0140 SQUARE	0090 SUFFIX	LOT
10 NBHD CODE	5429164 USE CODE	
C4 TX. ZONE TT	26195 AREA	
F.Y. 79 ASSESSMENT TOTAL 3,580,715		
IMPS.		
LAND 3,580,715		
187.00 ST. RATE	ADJ. RA	
F. Y. 79 REVISION		
F.Y. 80 PROPOSED TOTAL 4,715,100		
IMPS. -0-		
LAND $ 4,715,100		
$180.- ST. RATE	ADJ. RATE	

0140 SQUARE	0090 SUFFIX	LOT
10 NBHD CODE	5429164 USE CODE	
C4 TX ZONE TT	26195 AREA	
F.Y. 80 ASSESSMENT TOTAL 4,715,100		
IMPS.		
LAND 4,715,100		
180.00 ST. RATE	ADJ. RATE	
F. Y. 80 REVISION		
F.Y. 81 PROPOSED TOTAL 5,762,900		
IMPS. -0-		
LAND 5,762,900		
$220.- ST. RATE	ADJ. RATE	

0140 SQUARE	009 SUFFIX	L
10 NBHD CODE	216 USE CO	
C4 TX ZONE TT	2619 AR	
F.Y. 82 ASSESSMENT TOTAL 5,762,90		
IMPS.		
LAND 5,762,90		
220.0 ST. RATE	ADJ. RA	
F. Y. 82 REVISION		
F.Y. 83 PROPOSED TOTAL 24,988,20		
IMPS. 15,034,100		
LAND 9,954,10		
380. ST. RATE	ADJ. RA	

BY HAND

Mr. Robert Klugel
D.C. Department of Finance and Revenue
Room 2124
300 Indiana Avenue, N.W.
Washington, D.C. 20001

Re: 1111 - 19th Street, N.W.
Square 140, Lot 90

Dear Mr. Klugel:

I am writing to summarize our discussion over the last several months with respect to the tax year 1982 real estate assessment on the above referenced property. You will recall that I first spoke with you about this matter on September 10, 1981, after my associate Ms. Hite had inquired by telephone call to the Department of Finance and Revenue when the property owner's lender's agent had received a first half tax billing grossly higher than the applicable taxes based on the annual assessment of $5,752,900 (pursuant to D.C. Code §47-641, now §47-820). In a series of telephone conversations with you on September 10th, we were informed (1) that the Department had made this assessment several times previously but they "never got into the system", and (2) that a notice of assessment under §47-710 had been mailed on September 9th. In response, on behalf of the property owner, I informed you that no §710 assessment could apply because the building had been "erected and under roof" prior to the relevant statutory time period of January 1, 1981 to June 30, 1981, and that we would file an appeal with the Board and present the relevant facts. In response, you later telephoned and stated that no appeal would be necessary and that the assessment would be returned to $5,762,900 (the annual assessment) and that a corrected tax billing would be sent to the owner based on the assessment of $5,762,900 and that no penalties and interest would be apply

In reliance upon these representations, no appeal was then filed with the Board of Equalization and Review. In the weeks subsequent and since our discussions on September 10th, Ms. Hite inquired as to the status of the corrected bill and was told by you that the bill would be forthcoming. The latest conversation to that effect occurred on or about October 27, 1891, after the lender's agent had inquired to the Department and had been sent the same billing as previously received and changing penalties and interest. Upon telephone inquiry to you, Ms. Hite was told that the billing should be ignored and the corrected bill as previously discussed would soon be sent.

On November 12, 1981, I received a copy of a letter dated *October 19, 1981* with enclosures from Mr. Robert L. King, Acting Associate Director of the Department of Finance and Revenue state that the assessment notice under §47-710 (which on its face did not cite any statutory authority but instead purports to reply on "permit activity", a term not found in any statute or regulation) was untimely and "void" and that since the improvements had not been assessed, assessment under §47-712 had been made and the enclosed tax bills for three years, tax years 1980, 1981 and 1982, were enclosed to be paid within thirty days from the date of the letter.

The next day, November 13, 1981, Ms. Hite and I met with you to discuss this matter. In the course of our meeting, you confirmed to us the history of the events prior to the receipt of Mr. King's letter, as outlined above, conceded that the correct bill based on the amount of the annual assessment had not been sent and admitted that the District had not performed in accordance with the representations made on September 10th.

As counsel for the property owner, we have taken the following actions (of which you have been informed orally);

1 .An appeal from the §47-710 assessment was filed November 16, 1981 with the Board "as of September 10,

1981", the date the appeal was to be filed until you represented that no appeal was necessary. A hearing on the appeal is scheduled for 9:15 a.m. on Thursday, November 19, 1981.

2. We have requested a thirty-day extension for response to Mr. King's letter dated October 19, 1981 (see enclosed copy of letter to Mr. King.)

Subsequently to the Board's hearing on the appeal from the §47-710 assessment, we will be happy to meet with you, Mr. King and the tax division of the office of the Corporation Counsel to discuss the defects in the attempt to act under §47-712

Very truly yours,

Gilbert Hahn, Jr.

MKH:bw
Enclosure
cc: Mr. Robert L. King.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

1111 19th Street Associates
Limited Partnership
D. F. Antonelli, General Partner
1735 Jefferson Davis Highway
Crystal City
Arlington, Virginia 22202
Petitioner

Docket No. 3096-82

v.

DISTRICT OF COLUMBIA
District Building
14th and E Streets, N.W.
Washington, D.C. 20004
Respondent

Filed Jan. 4, 1982

—

PETITION
(For Refund of Additional Real Estate Taxes For Tax Years 1980 and 1981 Allegedly Assessed Pursuant to D.C. Code §47-712, 1973 ed.)

1. The jurisdiction of this Court is invoked pursuant to §§11-1201, 11-1202, 47-3303, 47-3304 and 47-3305, of the District of Columbia code (1981 ed.).

2. The real estate taxes in question are additional real estate taxes in the amount of $137,561.10 for Tax Year 1980 and $320,226.32 for Tax Year 1981 allegedly levied under the authority of D.C. Code §47-712 (1973 ed., now §47-831, 1981 ed.). The alleged assessment included Tax Year 1982 which will be the subject of a separate petition. The facts with respect to all three tax years are included herein as they are relevant to this petition.

3. Petitioner 1111 19th Street Associates, D. F. Antonelli, General Partner ("1111 19th Street Associates") is a limited partnership organized and existing under the

laws of the District of Columbia and has a principal place of business at 1735 Jefferson Davis Highway, Crystal City, Arlington, Virginia. Petitioner 1111 19th Street Associates is the owner of real estate in the District of Columbia known as Lot 90 in Square 140 with premises known as 1111 19th Street, N.W. ("the subject property") and is obligated to pay all real estate taxes assessed against the subject property.

4. The Respondent District of Columbia is a municipal corporation created by the United States Congress, §§-101, 102 of the D.C. Code (1981 ed.)

5. *Tax Year 1980*: On or about March 1, 1979, Petitioner received a notice of annual assessment (D.C. Code §47-820, 1981 ed., formerly §47-641) for Tax Year 1980 in the amount of $4,715,100, as of January 1, 1979. No appeal was filed with respect to this assessment and the assessment became final on July 1, 1979. The taxpayer paid timely the taxes assessed in the amount of $86,286.34. As of prior to the valuation date of January 1, 1979, the District's assessment record file states that building plans were submitted 2/7/77, that the property was inspected 12/17/77 and that the property was under construction on 6/20/78 and 11/20/78.

6. *Tax Year 1981*: On or about March 1, 1980, Petitioner received a notice of annual assessment (D.C. Code §47-820, 1981 ed., formerly §47-641) for Tax Year 1981 in the amount of $5,762,900 as of January 1, 1980. No appeal was filed with respect to this assessment and the assessment became final on July 1, 1980. The taxpayer paid timely the taxes assessed in the amount of $122,749.78. In the interim from January 1, 1979 to January 1, 1980, the valuation dates for Tax Years 1980 and 1981, the District's assessment record file states "6-15-79 50% complete".

7. *Tax Year 1982*: On or about March 1, 1981, Petitioner received a notice of annual assessment (D.C. Code §47-820,

1981 ed., formerly §47-641) for Tax Year 1982 in the amount of $5,762,900, as of January 1, 1981. A copy of the notice is attached hereto as Exhibit A, incorporated by reference and made a part hereof. No appeal was filed with respect to this assessment and the assessment became final on July 1, 1981. The taxpayer has never received the tax bill in the annual amount of $122,749.78 based on this assessment, although the District promised to send it as appears more fully below. In the interim from January 1, 1980 to January 1, 1981, the valuation dates for Tax Years 1981 and 1982, the Department's assessment record file states "100% complete . . . 5/29/80".

8. On or about September 3, 1981, Petitioner's management agent was notified by the agent for the lender (mortgagee), who escrows and issues payment of real estate taxes for the subject property, that the total annual taxes listed in tax billings for the first half of Tax Year 1982 was $444,675.84.

9. On September 10, 1981, after telephone inquiry to the District of Columbia Department of Finance and Revenue (the "Department"), counsel for Petitioner was informed that the annual real estate tax billing in the amount of $444,675.84 was due to an increase of assessment by the amount of $15,113,900 pursuant to §47-710 of the D.C. Code (now §47-829, D.C. Code, 1981 ed.) for a total assessment of $20,876,800, and that a notice to that effect had been sent to the taxpayer (Petitioner) on September 9, 1981. Upon being informed by Petitioner's counsel that no building activity within the provisions on §47-710 occurred during the statutory time period of January 1 to June 30, 1981 and that an appeal would be filed with the Board of Equalization and Review, counsel was informed by Mr. Robert Klugel of the Department that he had reviewed the assessment record on the property and that the Department had several times previously attempted to add to the assessment for new improvements attempted and to act now was illegal and untimely. Mr. Klugel then

stated that the total assessment of $20,876,500 was being reversed and that the annual assessment for Tax Year 1982 in the amount of $5,762,900 would be restored and a tax bill based on an assessment of $5,762,900 would be sent with no penalties or interest due and that no appeal to the Board was necessary. In reliance on the Department's promise that the assessment was restored to $5,762,900 and that the correct tax billing would be sent, Petitioner did not file an administrative appeal. The substance of Mr. Klugel's action is set forth in his memorandum of September 16, 1981 to the Office of the Corporation Counsel, attached hereto as Exhibit B, incorporated by reference and made a part hereof. To date, the tax bill for first-half taxes in the amount of $6,374.89 based on annual taxes of $122,749.78 has not been received although Petitioner's counsel was repeatedly assured by Mr. Klugel on several occasions including on or about October 27, 1981, that the correct tax bill would be sent.

10. On September 11, 1981, taxpayer received a "Notice of Property Assessment for Tax Year 1982", dated September 8, 1981, stating an increase in total assessment for Tax Year 1982 from $5,762,900 to $20,876,800 with the stated "Reason For Change: Permit Work." A copy of the notice is attached hereto as Exhibit C, incorporated by reference and made a part hereof. The notice further informed the taxpayer that an appeal to the Board of Equalization and Review could be filed "between September 1 and September 30 . . .", a right provided by §47-710, but which taxpayer did not exercise in reliance on the Department's promise that no appeal was necessary.

11. On November 12, 1981, Counsel for Petitioner received in the mail, a copy of a letter dated October 19, 1981 from the Department of Finance and Revenue by Robert L. King, Acting Associate Director stating that the use of §47-710 for permit work was untimely and that ". . . we have concluded that the improvements to the property have *never* been assessed since construction be-

gan in 1979. Therefore, pursuant to §47-712, we have assessed the improvements to the subject property for tax years 1980, 1981 and 1982." The letter proceeded to state that tax bills were enclosed for payment within 30 days, i.e., on or before November 18, 1981. A copy of the letter of October 19, 1981 and the enclosures are attached hereto as Exhibits D-1, D-2, D-3 and D-4, incorporated by reference and made a part hereof. The taxpayer received the original of the letter on or about November 9, 1981. The delay in receipt of the letter is unexplained. Subsequently, at the request of the taxpayer, though counsel, the date for response to the purported tax bills was extended by the Department to December 9, 1981 and then to December 31, 1981.

12. The enclosures to the Department's letter of October 19, 1981 are more specifically described as follows:

(a) Exhibit D-2 hereto is dated 10/26/81 and states the following: "payer's Receipt"; "Fiscal Year 1981"; "Total Assessed Value 12232100"; "Total Tax 137,561.10" and states further "Return all copies of this Notice with Payment to Department of Finance and Revenue."

(b) Exhibit D-3 attached hereto is dated 10/15/81 and states: "1981 Second Half Tax Bill Class III"; "ADMIN. ERROR"; "IMPS ADDED"; "TOTAL ASSESSMENT AT MARKET VALUE 20797000"; "Payment due by Mar 31 81" "FULL YEAR 32022632".

(c) Exhibit D-4 attached hereto is dated 10/51/81 and states: "1982 FIRST HALF TAX BILL CLASS III"; "IMPS ADDED"; "ADMIN. ERROR"; "TOTAL ASSESSMENT AT MARKET VALUE 20797000"; "FIRST HALF 22148805"; "SEP 15 81 FULL YEAR 44297610".

13. The purported tax billings attached hereto as Exhibits D-2, D-3 and D-4 were timely paid on December 31,

1981 and copies of the receipted "billings" are attached hereto as Exhibits E-1, E-2 and E-3, incorporated by reference and made a part hereof. The "billings" were paid under threat of penalties and interest to be assessed and the threat of the sale of the property for delinquent taxes if not paid.

14. After receipt of the Department's letter dated October 19, 1981, Petitioner, through counsel, on November 16, 1981 filed an administrative appeal from the §47-710 assessment with the Board of Equalization and Review, as of September 10, 1981, the date of the District's promise to restore the Tax Year 1982 assessment of $5,762,900 and issue a correct tax bill in accordance with the assessment; a copy of the appeal is attached hereto as Exhibit F, incorporated by reference and made a part hereof. A hearing on the appeal was held November 19, 1981, at which time the District appeared through counsel and argued that the §47-710 assessment had been withdrawn and the Board had no jurisdiction to hear the appeal. By letter dated December 7, 1981, a copy of which is attached hereto as Exhibit G, incorporated by reference and made a part hereof, the Board informed Petitioner that it would take no action on the appeal because of the District's position that the §47-710 assessment had been withdrawn.

15. The alleged assessments and tax billings are illegal, invalid, exactions, an abuse of the taxing authority and deprive Petitioner of the due process afforded by the Fifth Amendment to the Constitution of the United States of America for the following reasons:

(a) The alleged assessments do not comply with D.C. Code §47-712, now §47-831, or any other statutory authority of the D.C. Code and particularly Title 47 of the D.C. Code;

(b) The only assessments made according to law for the subject property for Tax Years 1980 and 1981

are the annual assessments in the following amounts: Tax Year 1980: $4,715,100; Tax Year 1981: $5,762,900.

(c) The subject property and it's total assessed value of each Tax Year (1980, 1981 and 1982) were listed in the assessment roles pursuant to D.C. Code §§47-823 and 825(g) (1981 ed.) which requires the listing of the total assessments of all real property.

(d) §47-712 contains no authority to revalue and reassess property previously assessed and contains no authority to assess only a portion of the property.

(e) There is no authority in the District of Columbia Code to reassess or revalue on the grounds of "administrative error".

(f) The letter of October 19, 1981 and it's enclosures, Exhibits D-1, D-2, D-3 and D-4 hereto, do not comply with D.C. Code §47-824 (1981 ed.) (formerly §47-645).

(g) The subject property was not "omitted" from assessment and taxation within the provisions of D.C. Code §47-712 (1973 ed.)

(h) The alleged assessments of the improvements under §47-712 are barred because not made within three years of when the District first "learned" of the existence of the improvements.

(i) The alleged assessments under §47-712 were in fact made at the instruction of the Office of the Corporation Counsel in violation of the limited authority of the statute.

(j) The District first "learned" of the improvements on the subject property in 1977.

16. The facts in support of this Petition are as follows:

(a) The subject property was assessed annually for Tax Years 1980 and 1981 and taxes were timely paid.

(b) The subject property and it's total assessed value appeared on the assessment roll for each of the subject years as required by D.C. Code §§47-823 and 825(g).

(c) The subject improvements were known to the District in 1977 and on each valuation date for annual assessment for Tax Years 1980, 1981 and 1982.

(d) The alleged assessments under §47-712 were in fact made at the instruction of the Office of the Corporation Counsel in violation of the limited authority of the statute.

WHEREFORE, Petitioner prays that the Court hear this Petition and grant the following relief:

1. Order that the Tax Year 1980 assessment allegedly made pursuant to D.C. Code §47-712 (now §47-831, 1981 ed.) be declared void, illegal, invalid and of no effect and order that the annual assessment of $4,715,100 be restored and that the District of Columbia refund to Petitioner the amount of $137,561.10 in additional taxes paid on December 31, 1981, together with interest at market rates from December 31, 1981 to the date of the refund, and

2. Order that the Tax Year 1981 assessment allegedly made pursuant to D.C. Code §47-712 (now §47-831, 1981 ed.) be declared void, illegal, invalid and of no effect and order that the annual assessment of $5,762,900 be restored and that the District of Columbia refund to Petitioner the amount of $320,226.32 in additional taxes paid of December 31, 1981 together with interest at market rates from December 31, 1981 to the date of payment of the refund, and

3. Order that Respondent District of Columbia reimburse Petitioner for all attorneys fees and costs incurred in this action, and

4. Such other relief as the Court may deem meet and just.

Respectfully submitted,

/s/Gilbert Hahn, Jr.
GILBERT HAHN, JR., ESQ.
MARY KATHLEEN HITE, ESQ.
Wolf, Amram and Hahn
Suite 1100
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 783-3344

Attorney for Petitioner

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARMENT OF FINANCE AND REVENUE

NOTICE OF PROPERTY ASSESSMENT FOR TAX YEAR 1982

SQUARE: 0140 LOT: 0090 NOTICE DATE: 02/22/81
PROPERTY ADDRESS: 19TH ST., N.W.
TYPE OF LAND USE: 91 VACANT
ASSESSED VALUE TAX YEAR 1981:
LAND: 5,762,900 TOTAL: 5,762,900
PROPOSED ASSESSED VALUE TAX YEAR 1982:
LAND: 5,762,900 TOTAL: 5,762,900

1111 19TH ST BLDG ASSOC
C/O STEPHEN J YETSO
1725 DESALES ST NW
WASHINGTON DC 20036

REASON FOR CHANGE: ANNUAL REVALUATION

FP-151 (REV. 11-80) THIS IS NOT A TAX BILL
IMPORTANT INFORMATION ON REVERSE SIDE
EXHIBIT A

D.C.-44
April 1980

Memorandum Government of the District of Columbia
Department, Finance and Revenue
Agency, Office: Real Property Taxes

TO: Richard L. Aguglia
Assistant Corporation Counsel, D.C.
Chief, Taxation Section
Legal Counsel Division

FROM: Robert L. Klugel Date: September 16, 1981
Acting Supervisor
Standards and Review Unit

SUBJECT: Determined misuse of section 47-710 D.C. Code (new structures erected or roofed, and additions to or improvements of old structures which shall not have theretofore been assessed) said section is interpreted to include those properties where construction has occurred between January 1 but prior to July 1 annually.

Reference is made to our telephone conversation of September 10, 1981 regarding the questionable increase proposed for Square 140 Lot 90 being a constructed completed office building located at 1111 - 19th Street, N.W. My investigation into this matter is the result of a telephone call I received from Gilbert Hahn, Jr. the morning of September 10, 1981. Mr. Hahn advised, his client had received notice of assessment in late February early March 1981, of a proposed 1982 TY assessment of $5,762,900 for the subject property. In August 1981 the taxpayer received his tax bill for the first half 1982 TY which indicated a total assessment of $20,875,800 or an increase of $15,113,900. Additionally, the taxpayer had not received notice of the proposed increase as of September 10, 1981. In a number of telephone conversations between your office and this writer during August 1981 regarding the legal

time deadline that such notices must be in the mail, it was our mutual agreement that supplemental increases (47-710 assessments) must be postmarked not later than September 1, 1981. I was advised the notice was mailed September 9, 1981. A copy of this notice, is attached which bears a date of September 8, 1981.

It is obvious that our joint efforts by conducting meetings with the assessment staff exampling the proper use of Sections 47-710 and 47-711 of the Code requires further interpretation and for this I apologize.

A copy of the authorized construction permit number B254425 has been attached in order that you may visualize the series of errors which have taken place.

(A) Construction was apparently in progress but not sufficiently complete to warrant the under roof assessment June 20, 1978.

(B) June 15, 1979 the improvements were considered 50% complete at which time the original building assessment should have been placed on the roll. However, the partial assessment was either not processed or did not reach the proper computer tape as there is no record of any form of building value assigned to Square 140 Lot 90.

(C) May 29, 1980 the building was considered 100% complete however again there is no record of a value assigned to the improvements.

(D) December 1980 the assessor indicates a finish building value of $12,423,560 which did not get into the system.

(E) June 24, 1981 a 47-710 assessment for the improvement completion was processed amounting to the $15,113,900 which is in question herein.

The copy of the September 8, 1981 assessment notice (attached) is also improperly coded as being 91 vacant (a vacant land classification).

In my opinion, the June 24, 1981 supplemental increase using 47-710 is improper and should have been processed in the 1982 review which would have produced the same results. Our history of litigation with Hahn and others regarding 47-710 and 47-711 assessments without question requires that construction in progress must equal to or be similar with the actual cost or market value increase experience by the property during the applicable 6 month period. Subject property was 100% complete over two years prior to the date the assessment was actually placed on the assessment roll.

As a result of my investigation I find we are not aware of building areas, specifications or quality of construction since the construction plans cannot be located within our office. I have been assured the occupancy permit and copy of the plans will be in our hands by the close of business today.

To avoid litigation and the necessary time devoted by both your staff and ours, I have processed a reversal of the June 24, 1981 increase as discussed with your in our telephone conversation of September 19, 1981. This memorandum is therefore to document the events that have taken place regarding the subject property. It is my understanding that you will provide a reply indicating your endorsement of the cancellation of what I have termed an illegal assessment.

Please be advised that we will include this property and the improvement assessment in our 1983 review unless you believe this property is justified a 47-712 omitted assessment which I ask be included in your written opinion.

cc: Carol L. Smith
Robert L. King
Charles W. Fortney
Herman C. Ricks

EXHIBIT B

Permit Card

DEPARTMENT OF FINANCE AND REVENUE

Assessment Services Division

Squre: 140 Lot: 90 Parcel: Plan #165 19

House No.: 1111 19th St., N.W.
Permit No.: P254425 ADD FIN. $15,113,900 1 1/2
Des. of Imps.: New Bldg. Stories: 100% Complete
NPEC IMPS NEVER GOT IN SYSTEM
Cu. ft.: S.N.Y. Inspected 12-17-77
Estimated Cost: S.N.Y. GCC
Assessed: S.N.Y. 6-25-78 MGS under construction S.N.Y. under construction 11-20-78. M.L.S. 6-15-79. 50% Complete.

FP 153 (Rev. 8-70) P-2146 100% Complete MLS 5/29/80

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

NOTICE OF PROPERTY ASSESSMENT FOR TAX YEAR 1982

SQUARE: 0140 LOT: 0090 NOTICE DATE: 09/08/81
PROPERTY ADDRESS: 19TH ST., N.W.
TYPE OF LAND USE: 91 VACANT
ASSESSED VALUE TAX YEAR 1982:
LAND: 5,762,900 TOTAL: 5,762,900
CHANGE IN VALUE:
LAND: AMOUNT: 0 PERCENT: .0
BUILDING: AMOUNT: 5,113,900 PERCENT: 100.0
TOTAL: AMOUNT: 5,113,900 PERCENT: 262.3
PROPOSED ASSESSED VALUE TAX YEAR 1982:
LAND: 5,762,900 BUILDING: 15,113,900
TOTAL: 20,876,800

1111 19TH ST BLDG ASSOC
C/O STEPHEN J YETSO
1725 DESALES ST NW
WASHINGTON DC 20036

REASON FOR CHANGE: PERMIT WORK

FP-151 (REV. 11-80) THIS IS NOT A TAX BILL
IMPORTANT INFORMATION ON REVERSE SIDE

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

NOTICE OF PROPERTY ASSESSMENT FOR TAX YEAR 1982

SQUARE: 0140 LOT: 0090 NOTICE DATE: 09/08/81
PROPERTY ADDRESS: 19TH ST., N.W.
TYPE OF LAND USE: 91 VACANT
ASSESSED VALUE TAX YEAR 1982:
LAND: 5,762,900 TOTAL: 5,762,900
CHANGE IN VALUE:
LAND: AMOUNT: 0 PERCENT: .0
BUILDING: AMOUNT: 5,113,900 PERCENT: 100.0
TOTAL: AMOUNT: 5,113,900 PERCENT: 262.3
PROPOSED ASSESSED VALUE TAX YEAR 1982:
LAND: 5,762,900 BUILDING: 15,113,900 TOTAL: 20,876,800

1111 19TH ST BLDG ASSOC
C/O STEPHEN J YETSO
1725 DESALES ST NW
WASHINGTON DC 20036

REASON FOR CHANGE: PERMIT WORK

FP-151 (REV. 11-80) THIS IS NOT A TAX BILL
IMPORTANT INFORMATION ON REVERSE SIDE

RECEIVED SEP. 11, 1981 FM ACCT. DEPT.

YOU MAY FILE AN APPEAL BETWEEN SEPTEMBER 1 AND SEPTEMBER 30 AFTER WHICH NO FURTHER APPEAL WILL BE FILED OR WILL BE CONSIDERED.

EXHIBIT C

DISTRICT OF COLUMBIA
COURT OF APPEALS

1111 19TH STREET ASSOCIATES
Appellant

v. Appeal No. 85-56

DISTRICT OF COLUMBIA
Appellee

On Appeal from Orders of the Tax Division of the Superior Court of the District of Columbia

---

BRIEF FOR THE APPELLANT

GILBERT HAHN, JR., ESQ.
AMRAM AND HAHN, P.C.
Suite 1100
1155 15th Street, N. W.
Washington, D. C. 20005
(202) 783-3344
Attorney for Appellant
and Counsel who will argue
the appeal

DISTRICT OF COLUMBIA
COURT OF APPEALS

1111 19TH STREET ASSOCIATES
Appellant

v. Appeal No. 85-56

DISTRICT OF COLUMBIA
Appellee

CERTIFICATE REQUIRED BY RULE 29(a)(1) OF THE GENERAL RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned, counsel of record for Appellant, certifies that the following listed parties appeared below:

1111 19th Street Associates, a limited partnership, D. F. Antonelli, a general partner, Petitioner The District of Columbia, Respondent

These representations are made in order that the judges of this Court, *inter alia,* may evaluate possible disqualification or recusal.

Attorney of Record for Appellant

/s/Gilbert Hahn, Jr., Esq.
Gilbert Hahn, Jr., Esq.

October 19, 1981

1111 19th Street Building Associates
c/o Stephen J. Yetso
1725 DeSales Street, N.W.
Washington, D.C. 20036

Dear Mr. Yetso:

A notice of Assessment for tax year 1982, dated September 8, 1981 was previously mailed to you regarding the assessment of a twelve story office building constructed on Lot 90 in Square 140. We regret the use of §47-710 of the D.C. Code for permit work was untimely. Please consider that notice void.

However, in reviewing the files, we have concluded that the improvements to the property have *never* been assessed since construction began in 1977. Therefore, pursuant to §47-712, we have assessed the improvements to the subject property for tax years 1980, 1981 and 1982. As a result tax bills are enclosed for payment, due in thirty (30) days from the date of this letter. Penalty and Interest will not be added to the bills within this thirty (30) day period.

If you desire to contest these assessments, you may do so, having first prepaid the taxes in dispute, by making an appeal to the Superior Court, Tax Division, within six (6) months after the date of this notice/letter. See, D.C. Code 1973 edition, §47-712.

Sincerely,

Robert L. King
Acting Associate Director
Enclosure:
cc: Gilbert Hahn, Jr.

RECEIVED NOV. 12, 1981 EXHIBIT D-1

Government of the District of Columbia
DEPARTMENT OF FINANCE AND REVENUE
Assessment Services Division
PAYER'S RECEIPT
NOT FOR DATA PROCESSING PARTIAL PAYMENT
BALANCE PAYMENT

FISCAL YEAR 1980 July 1, 1979 to June 30, 1980 FOR 1980 ALL PARTIAL

SQUARE: 140 LOT: 90 TOTAL ASSESSED VALUE: 12232100
10/16/81bj CCM

1111 19TH ST BLDG ASSOC
1725 DESALES ST NW
WASHINGTON DC 20036

HALF TAX: 25637.38 TOTAL TAX: 111923.72
TOTAL: 137561.10

CREDIT 9011

A $5.00 penalty will be imposed if a check in payment of this assessment is not honored by your bank. Make check or money order payable to D.C. Treasurer. RETURN THIS NOTICE WITH PAYMENT TO: Department of Finance and Revenue, Room 2000—300 Indiana Ave., N.W., Washington, D.C. 20001.

FP-15B (Rev. 6-69) (Cleared by D.C. Treasurer) 0-70019

EXHIBIT D-2

TAX YEAR IS JULY 1 1980 THRU JUNE 30 1981
GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

IMPS ADDED ADMIN ERROR 10/15/81bj CCM

SQUARE: 140 LOT: 90
PROPERTY ADDRESS: 1111 19TH ST NW
TOTAL ASSESSMENT AT MARKET VALUE: 20797000
TAX RATE PER $100: 2.13
TOTAL TAX FOR YEAR: 442976.10

DESCRIPTION: 1981 SECOND HALF TAX BILL CLASS III

FIRST HALF TAX: TAX: 98738.27 TOTAL: 98738.27
SECOND HALF TAX: TAX: 221488.05 TOTAL: 221488.05
PAYMENT DUE BY: MAR 31 81
FULL YEAR: 320226.32

SEE REVERSE SIDE FOR IMPORTANT INFORMATION
THIS COPY MUST BE RETURNED WITH PAYMENT
TAX CREDIT 1000 P & I CREDIT 1060 81-2-004724

EXHIBIT D-3

TAX YEAR IS JULY 1 1980 THRU JUNE 30 1981
GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

IMPS ADDED ADMIN ERROR 10/15/81bj CCM

SQUARE: 140 LOT: 90
PROPERTY ADDRESS: 1111 19TH ST NW
TOTAL ASSESSMENT AT MARKET VALUE: 20797000
TAX RATE PER $100: 2.13
TOTAL TAX FOR YEAR: 442976.10

DESCRIPTION: 1982 FIRST HALF TAX BILL CLASS III

FIRST HALF TAX: TAX: 22148.05 TOTAL: 221488.05
TOTAL TAX: FIRST HALF: 221488.05
FULL YEAR: 442976.10
SEP 15 81 81-2-004724

EXHIBIT D-4

Government of the District of Columbia
DEPARTMENT OF FINANCE AND REVENUE
Assessment Services Division
PAYER'S RECEIPT

NOT FOR DATA PROCESSING PARTIAL PAYMENT BALANCE PAYMENT

FISCAL YEAR 1980 July 1, 1979 to June 30, 1980
FOR: 1980 ALL PARTIAL

SQUARE: 140 LOT: 90
TOTAL ASSESSED VALUE: 12232100
10/16/81bj CCM

1111 19TH ST BLDG ASSOC
1725 DESALES ST NW
WASHINGTON DC 20036

HALF TAX: 25637.38 TOTAL TAX: 111923.72
TOTAL: 137561.10

CREDIT 9011

A $5.00 penalty will be imposed if a check in payment of this assessment is not honored by your bank. Make check or money order payable to D.C. Treasurer. RETURN THIS NOTICE WITH PAYMENT TO: Department of Finance and Revenue, Room 2000—300 Indiana Ave., N.W., Washington, D.C. 20001.

FP-15B (Rev. 6-69) (Cleared by D.C. Treasurer) J-70019

EXHIBIT E-1

TAX YEAR IS JULY 1 1980 THRU JUNE 30 1981
GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

IMPS ADDED ADMIN ERROR 10/15/81bj CCM

SQUARE: 140 LOT: 90
PROPERTY ADDRESS: 1111 19TH ST NW
TOTAL ASSESSMENT AT MARKET VALUE: 20797000
TAX RATE PER $100: 2.13
TOTAL TAX FOR YEAR: 442976.10

DESCRIPTION: 1981 SECOND HALF TAX BILL CLASS III

FIRST HALF TAX: TAX: 98738.27 TOTAL: 98738.27
SECOND HALF TAX: TAX: 221488.05 TOTAL: 221488.05
AMOUNT DUE: 320226.32

RECEIVED JAN 02, 1982
WOLF, AMRAM & HAHN, P.C. 81-2-004724

DETACH AND KEEP THIS COPY

EXHIBIT E-2

TAX YEAR 1982 IS JULY 1 1980 THRU JUNE 30 1982
GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

IMPS ADDED ADMIN ERROR 10/15/81bj CCM

SQUARE: 140 LOT: 90
PROPERTY ADDRESS: 1111 19TH ST NW
TOTAL ASSESSMENT AT MARKET VALUE: 20797000
TAX RATE PER $100: 2.13
TOTAL TAX FOR YEAR: 442976.10

DESCRIPTION: 1982 FIRST HALF TAX BILL CLASS III

FIRST HALF TAX: TAX: 22148.05 TOTAL: 221488.05
TOTAL TAX: 221488.05

IF THE ABOVE NAMED AGENT IS NOT PAYING THIS TAX PLEASE CONTACT THIS OFFICE BY CALLING 727-6440.

81-2-004724 EXHIBIT E-3

BOARD OF EQUALIZATION AND REVIEW
OF THE DISTRICT OF COLUMBIA

APPEAL FROM REAL ESTATE ASSESSMENT

(This form is to be submitted in Duplicate and is to be used for property in one square or parcel only)

TO THE BOARD OF EQUALIZATION AND REVIEW:

Appeal of_____

Mailing Address: 1111 19th Street Associates, c/o Gilbert Hahn, Jr., Esq., Wolf, Amram and Hahn, Suite 1100, 1155 15th Street, N.W., Washington, D.C. 20005.

Telephone: Home_____
Business: 783-3344

This appeal is filed in accordance with D.C Code 1973 ed., Section 47-710 (Supp. V, 1978). The petitioner respectfully petitions the Board of Equalization and Review to reduce the assessed valuation of the real property described below for the Tax Year 1982.

Petitioner respectfully sets for the following facts and grounds upon which this appeal is made, together with additional pertinent information submitted for consideration by the Board of Equalization and Review.

I. Property Description and Assessment Information:

A. Location of property: 1111 19th Street, N.W.

B. Square: 140 Lot(s): 90 Parcel

C. If possible, submit a recent photograph of the property.

D. Neighborhood description (Anacostia, Burleith, Glover Park, etc.)

E. Type of property: Single-family resident (including condominiums) ____, Multi-family resident ____, Commercial ____, Industrial ____, Vacant land ____. None of the following is applicable except where otherwise indicated.

II. The following facts relate to the MARKET VALUE of the property:

A. Petitioner's estimate of current MARKET VALUE of the property $_____ .

B. Date of purchase _____ . Purchase Price $_____ . Amounts and dates of current trusts _____ .

C. Is the property for sale? (yes__ no__). Offering Price $_____ .

D. Has the property been appraised? ____ . Date ____ . Appraised Value $_____ .

E. Has the property been remodeled, rehabilitated or otherwise improved within the last two years? (yes__ no__). If year, complete and attach Form FP-315.

F. Is the property rented or leased? (yes__ no__). If yes, complete and attach Form FP-316 or submit "Schedule of Income and Expenses" with this appeal.

G. Year of construction of buildings _____ . On new construction, complete and attached Form FP-315 or submit "Schedule of Costs" with this appeal.

H. Is a personal appearance before the Board requested? (yes__ no__). (If you fail to fill in this blank, you will NOT be given a personal appearance.)

III. State reason for appeal and any other additional information for consideration by the Board. (Attach additional statements if necessary.) Please see attachment.

I (we) declare under the penalties of perjury that this appeal (including any accompanying schedules and statements) have been examined by me (us), and to the best of my (our) knowledge and belief is true, correct and complete.

Date: 11/16/81 as of 9/10/81

1111 19th Street Associates

By Their Attorney
Gilbert Hahn, Jr., Esq.

If signed by someone other than the Owner, list the Owner's name _____.

EXHIBIT F

Attachment
1111 19th Street, N.W.
Square 140, Lot 90

Assessment should be restored to $5,762,900, the assessment made according to law under Section 47-641 (now §47-820), as no building activity subject to assessment under D.C. Code Section 47-710 (now Section 47-829) took place between January 1, 1981 and July 1, 1981. The assessment for this property made under Section 47-641 (now 47-820) should be restored.

This appeal is made as of September 10, 1981. No appeal was filed because it was represented as not being necessary and because a revised bill consistent with the Section 47-641 (now 47-820) assessment was represented as being made in its place. Since this was not done, Taxpayer believes itself to be entitled to file the administrative appeal that it was prepared to file on September 10, 1981.

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Appeal were hand-delivered to Mr. Robert Klugel, Department of Finance and Revenue, 300 Indiana Avenue, N.W., Washington, D.C. 20001, this 16th day of November, 1981.

/s/Gilbert Hahn, Jr.
GILBERT HAHN, JR., ESQ.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW AND
BOARD OF EQUILIZATION [sic] AND REVIEW
ROOM 202, DISTRICT BUILDING
WASHINGTON, D.C. 20004

REPLY TO: BOARD OF EQUALIZATION AND REVIEW, ROOM 202, DISTRICT BUILDING, WASHINGTON, D.C. 20004, TELEPHONE: 727-6861 AND 727-6862

December 7, 1981

Gilbert Hahn, Jr., Esq.
Wolf, Amram & Hahn
Suite 1100
1155 - 15th Street, N.W.
Washington, D.C. 20005

Re: 1725 DeSales Street, N.W.
Square 140, Lot 90

Dear Mr. Hahn:

The Board of Equalization and Review has refused to act on your application for appeal under §710 of the D.C. Code, 1973 ed., for the reason that the Department of Finance and Revenue has withdrawn the assessment.

Very truly yours,

Samuel C. Reynolds
Samuel C. Reynolds, Chairman

RECEIVED DEC 10 1981 EXHIBIT G

TABLE OF CONTENTS

Page

CERTIFICATE OF COUNSEL ..... [81a]

TABLE OF AUTHORITIES ..... [84a]

STATEMENT OF THE ISSUES ..... [89a]

STATEMENT OF THE CASE ..... [89a]

STATEMENT OF THE FACTS ..... [95a]

ARGUMENT ..... [103a]

I. INTRODUCTION ..... [103a]

II. THE TRIAL COURT'S FINDINGS, CONCLUSIONS AND DENIAL OF RECONSIDERATION ARE CONTRARY TO THE LAW AND ARE NOT SUPPORTED BY THE EVIDENCE ..... [105a]

A. The Trial Court Erroneously Concluded that the Statute is Ambiguous and Erroneously Construed the Statute Against the Taxpayer and in Favor of the District ..... [105a]

B. The Statute is Clear that "Omitted" Means That the Entire Property was not Previously Assessed or Taxed ..... [111a]

C. The Leading Cases in Other Jurisdictions Interpret Statutes Similar to the District's Statute; That is they Allow Omitted or Escaped Assessments Only if the Entire Property had not been Previously Assessed and Taxed ..... [115a]

D. The Property was Previously Assessed and Taxed for Each of the Subject Tax Years ..... [120a]

E. Assuming the Authority to Assess, the District Did Not Act Timely ..... [123a]

III. THE TRIAL COURT FAILED TO CONSIDER AND DETERMINE SUBSTANTIAL ARGUMENTS ..... [127a]

A. The Court Failed to Determine the Taxpayer's Claims Under the Constitution . [127a]

B. The Assessments, if Made at all Were Impermissibly Made at the Direction of the Office of the Corporation Counsel Contrary to Law ..... [130a]

C. The Trial Court was not Entitled to Ignore the Self-Evident Facts that the Assessments of the Total Property were Increased During the Period that the Assessor was Aware of the Building Progress ..... [132a]

IV. THE TAXPAYER IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND INTEREST AT MARKET RATES ..... [133a]

V. CONCLUSION ..... [135a]

CERTIFICATE OF SERVICE ..... [136a]

TABLE OF AUTHORITIES

CASES: Page

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612 (1975) ..... [133a]

B&M Company v. U.S., 452 F.2d 986 (5th Cir. 1972) ..... [107a]

Block Pitt Invest. v. Assessor of Bernadillo County, 86 N.M. 589, 526 P.2d 183 (1977) ..... [116a]

Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954) ..... [128a]

Busse v. Commissioner of Internal Revenue, 479 F.2d 1147 (7th Cir. 1973) ..... [107a]

Circle Discount Corp. v. U.S., 211 F.Supp. 743 (D.D.C. 1962) ..... [107a]

Congregational Home v. D.C., 92 U.S. App.D.C. 73, 202 F.2d 808 (1953) ..... [114a]

Crooks v. Harrelson, 282 U.S. 55, 51 S.Ct. 49 (1930) ..... [109a]

D.C.R.L.A., et al. v. D.C., Tax Dockets 2369, 2370, 2374, 2375, D.C.Super. Ct. 1976 (Opinion and Order) ..... [115a, 123a]

D.C.R.L.A., et al. v. D.C., 106 Wash. D.L. Rptr. 2257, December 15, 1978 (Tax Dockets 2447, 2449, 2452) ..... [123a]

D.C.R.L.A., et al. v. D.C., Tax Dockets 2412, 2448, D.C.Super. Ct., 1983 (Memorandum Order) . [115a]

D.C.R.L.A. and Bresler & Reiner, Inc. v. D.C., 106 Wash.D.L.Rptr. 793, May 2, 1978 (Tax Docket 2298) ..... [109a, 113a]

D.C.R.L.A. and Bresler & Reiner, Inc. v. D.C., Tax Dockets 2515, 2516, D.C.Super. Ct., 1979 (Memorandum Order) ..... [123a]

D.C.R.L.A. and L'Enfant Plaza v. D.C., 107 Wash.D.L.Rptr. 949, May 31, 1979 (Tax Dockets 2460, 2461, 2462, 2517, 2518) ..... [115a, 122a, 123a]

Table of Authorities Continued

Page

D.C.R.L.A. and Trilon Plaza v. D.C., Tax Docket 2451, D.C.Super. Ct., 1979 (Order) ..... [123a]

D.C.R.L.A. and Trilon Plaza Co. v. D.C., Tax Docket 2513, D.C.Super. Ct., 1980 (Consent Order) ..... [123a]

Delaware, L.S.W. Ry. Co. v. Kingsley, 189 F.Supp. 39 (D.N.J. 1960) ..... [129a]

Dillard v. Yeldell, 334 A.2d 578 (D.C. 1975) ..... [134a]

District of Columbia v. All of Parcel 137/216 in Square 3623, etc., 109 Wash.D.L.Rptr. 2581, December 17, 1981 (Civil Action No. 10242-73) ..... [135a]

**District of Columbia v. Burlington Apartment House Co.*, 375 A.2d 1052 (D.C. 1977) ..... [123a]

District of Columbia v. Green, 348 A.2d 305 (D.C. 1973) ..... [129a]

District of Columbia v. National Bank of Washington, 431 A.2d 1 (D.C. 1981) ..... [135a]

1899 L Street Associates v. D.C., Tax Docket 2823, D.C.Super. Ct., 1981 (Consent Order) .. [122a, 123a]

1111 19th Street Associates v. D.C., Tax Docket 3159, D.C.Super. Ct., 1982 (Order), D.C. Ct. of App., App. No. 82-917 (dismissed) ..... [89a]

Elgin, J. & E. Ry. Co. v. Barley, 325 U.S. 711, 65 S.Ct. 1282 (1945) ..... [127a]

Estate of Renick v. U.S., 687 F.2d 371 (Ct. Cl. 1982) ..... [107a, 109a]

15th and L Street Associates v. D.C., Tax Docket 2471, D.C.Super. Ct., 1980 (Consent Order) ..... [122a, 123a]

Gould v. Gould, 245 U.S. 151, 38 S.Ct. 53 (1917) ..... [107a, 108a]

Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943 (1973) .. [134a]

Table of Authorities Continued

Page

Hillsborough Twp. Somerset County, N.J. v. Cromwell, 326 U.S. 620, 66 S.Ct. 445 (1946) ..... [129a]

In re Chicago Rys. Co., 175 F.2d 282 (7th Cir. 1949) *cert. denied,* 338 U.S. 850, 70 S.Ct. 94 (1949) ..... [129a]

Kelly v. D.C., 102 Wash.D.L.Rptr. 2081, October 21, 1974 (Tax Docket 2225) (Kelly I) ..... [129a]

Kelly v. D.C., 105 Wash.D.L.Rptr. 2081, April 5, [sic] 1977 (Tax Docket 2225) (Kelly II) ..... [129a]

Lappin v. D.C., 22 App. D.C. 68 (D.C. Cir. 1903) ..... [128a]

Leyh v. Glass, 509 P.2d 259 (Okla. 1973) ... [115a, 116a]

Markham v. Friedland, 245 So.2d 645 (Fla.Dist.Ct.App. 1971) ..... [116a]

Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S.Ct. 260 (1932) ..... [106a, 107a]

Nield v. D.C., 71 U.S.App.D.C. 306, 110 F.2d 246 (1940) ..... [128a]

1901 Wyoming Avenue Cooperative Ass'n v. Lee, 345 A.2d 456 (D.C. 1975) ..... [134a]

Partington v. Attorney General, L.R. 4 H.L. 100 ..... [108a]

Sq. 254 Limited Partnership v. D.C., Tax Docket 3313-83, D.C.Super. Ct., 1985 (Order) ..... [123a]

Tandy Leather Co. v. U.S., 347 F.2d 693 (5th Cir. 1965) ..... [107a]

Tradewell Stores, Inc. v. Snohomish County, 69 Wash. 2d 352, 418 P.2d 466 (1966) ..... [116a]

Trilon Plaza Co. v. Allstate Leasing Co., 399 A.2d 34 (D.C. 1979) ..... [134a]

**Trustees of St. Paul Methodist Episcopal Church v. D.C.,* 94 U.S.App.D.C. 78, 212 F.2d 244 (1954) ..... [113a, 114a, 131a]

Table of Authorities Continued

Page

Underhill v. Edwards, 400 So.2d 129 (Fla.Dist.Ct.App. 1981) ..... [116a]

U.S. v. de Bonchamps, 278 F.2d 127 (9th Cir. 1960) ..... [109a]

U.S. v. Merriam, 263 U.S. 179, 44 S.Ct. 69 (1923) ..... [107a, 108a, 109a]

Weinberger v. Weisenfeld, 420 U.S. 636, 95 S.Ct. 1225 (1975) ..... [128a]

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886) ..... [128a]

STATUTES:

D.C. Code

§47-801 (1981 ed.)(§47-621 (1973 ed.)) ..... [112a]

§47-802 (1981 ed.)(§47-622 (1973 ed.)) ..... [112a]

§47-810 (1981 ed.)(§47-611 (1973 ed.)) ..... [95a]

§47-820 (1981 ed.)(§47-641 (1973 ed.)) ..... [95a, 96a, 112a, 121a]

§47-821(a) (1981 ed.)(§47-642(a) (1973 ed.)) ..... [114a]

§47-823 (1981 ed.)(§47-643 (1973 ed.)) ..... [101a, 103a]

§47-824 (1981 ed.)(§47-645 (1973 ed.)) ..... [115a]

§47-829 (1981 ed.)(§47-710 (1973 ed.)) ..... [98a, 99a, 100a, 113a, 115a, 121a]

§47-830 (1981 ed.)(§47-711 (1973 ed.)) ..... [115a, 121a]

§47-831 (1981 ed.)(§47-712 (1973 ed.)) ..... [99a, 103a, 106a, 111a, 120a, 123a, 132a]

§47-2403 (1981 ed.)(§47-3303 (1973 ed.)) ..... [112a]

§47-2404 (1981 ed.)(§47-3304 (1973 ed.)) ..... [112a]

Table of Authorities Continued

Page

RULES:

D.C. Super. Court, Civil Division, Rule 11(b) .. [91a]
D.C. Super. Court, Tax Division, Rule 9(a) ..... [94a]

*Cases chiefly relied on.

STATEMENT OF THE ISSUES

1. Whether the Court erroneously concluded that the statute was susceptible of two meanings and erroneously construed the statute in favor of the District of Columbia.

2. Whether the Court improperly ruled that the subject assessments are legal.

3. Whether the Court's rulings are contrary to the law.

4. Whether the Court's rulings are not supported by the evidence.

5. Whether the Court improperly relied on equitable considerations.

6. Whether the Court erroneously found that the subject assessments were timely.

7. Whether the court improperly failed to consider Petitioner's constitutional claims and other legal claims.

STATEMENT OF THE CASE

This is an appeal by the owner of real estate in the District of Columbia from an order of the trial court sustaining the legality of "omitted property" assessments and additional real estate taxes on appellant's property for Tax Years 1980 and 1981 and from an order denying the owner's motion for reconsideration.

Appellant, petitioner below and hereinafter "the taxpayer" or "the owner" timely filed a petition with Exhibits in the Tax Division of the Superior Court of the District of Columbia on January 4, 1982 (R.1-26). The petition alleged the illegality, invalidity and unconstitutionality of

assessments[1] by Appellee District of Columbia, hereinafter "the District", purportedly under D.C. Code §47-712 (1973 ed., now §47-831, 1981 ed.) and the refund of additional real estate taxes paid in the amounts of $137,561.10 for Tax Year 1980 and $320,226.32 for Tax Year 1981 (R.1, 8, 21-22). The petition also sought attorney's fees and interest on the refund at market rates (R.8). The petition alleged the illegality, invalidity and unconstitutionality of the assessments on the grounds, *inter alia*, that the property had been assessed and taxes paid for the subject tax years, and had not been omitted from assessment or taxation, the assessments did not comply with any statutory authority, the only assessments made according to law were the annual assessments for Tax Year 1980 and 1981 pursuant to which the required taxes had been paid, the assessments had been at the instruction of the Office of the Corporation Counsel and the District had knowledge of the improvements on the subject property since it first learned of the improvements in 1977 (R. 6-7). The facts and events which gave rise to filing of the petition are described in the Statement of the Facts below.

Following the filing of the petition, the taxpayer filed and served a notice of the taking of oral depositions together with subpoenas *duces tecum* on three employees of the District of Columbia who had participated in the events leading to these assessments (R. 27, 36) including Richard L. Aguglia, Assistant Corporation Counsel (R.27). The District then filed a Motion to Quash Subpoena and/or a Protective Order asserting that deposing Mr. Aguglia would violate the attorney-client privilege (R. 29). The taxpayer opposed the motion to quash on the grounds that the dis-

[1] Taxpayer also filed a petition challenging the valuation amounts of the assessments and that case, Tax Docket 3149-82 is on the reserve calendar of the Tax Division of the Superior Court of the District of Columbia by consent of the parties and with the approval of the trial court pending final disposition of the subject appeal which could obviate the need for any further proceedings on the alternative valuation suit.

covery was permissable and that a claim of attorney-client privilege, if one had existed, had been waived by the disclosuure to the taxpayer of memoranda from Mr. Aguglia showing his participation in the assessment events (R. 39-48). The District filed a reply asserting that the disclosed memoranda written by Mr. Aguglia were legal advice. A hearing on the motion to quash was held May 18, 1982 and by order filed May 18, 1982, (Judge John D. Fauntleroy) the Court granted the District's motion to quash and prohibited taxpayer from serving subpoenas on Mr. Aguglia for the taking of his testimony (R. 147).

On February 18, 1982, the District had filed its Answer to the petition admitting the taxpayer's factual allegations as discussed more fully below but denying the taxpayer's entitlement to relief (R. 53). Simultaneously, the District filed a motion for summary judgment (R. 58) which has opposed by the taxpayer (R. 73, 99) to which the District filed a reply (R. 115). After hearing on the motion on May 18, 1982, the District's motion for summary judgment was denied by Order entered May 18, 1982 (Judge John D. Fauntleroy) (R. 149).

Following the resolution of the motions described above,[2] the case was set for trial on September 21, 1982 (R. 349) and taxpayer proceeded with the discovery which had not been barred. Taxpayer deposed Mr. Robert King and Mr. Robert Klugel, employees of the Department of Finance and Revenue pursuant to notices of taking deposition (R. 150) and the District answered interrogations (R. 157). The trial date originally scheduled for September 21, 1982 was continued several times on the District's motions for continuances, first to July 11, 1983, then to September 26, 983 and ultimately to December 5, 1983 (R. 349-352).

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[2] As reflected in the Docket entries from the trial proceedings there were also various filings and a motion hearing on a motion to intervene which was ultimately denied (Fauntleroy, J.) and are not relevant to the merits of the case at issue in this appeal.

Following the completion of discovery and prior to trial, the taxpayer filed a Request for Admissions under Rule 36 (R. 164, 198) to which the District objected (R. 191). The taxpayer also filed a motion for relief from the earlier protective order barring service of subpoenas on Mr. Aguglia on the grounds that said order could arguably preclude calling Mr. Aguglia as a witness at trial and discovery had shown the relevance of his testimony (R. 234).

Also, less than a week before the scheduled trial date, the District filed a Motion for Reconsideration of the denial of its previous motion for reconsideration (R. 167) which was immediately opposed by the taxpayer (R. 200).

On the scheduled trial date of December 5, 1982, the Court (Judge Iraline Barnes) heard the pending preliminary matters and denied the District's motion for reconsideration of its motion for summary judgment, denied the taxpayer's motion for relief from the protective order, reserved ruling on taxpayer's request for admissions and the District's opposition and rescheduled trial to commence on December 13, 1983 because of the Court's schedule (R. 353). The parties' positions on various stipulations of facts were also discussed and the agreed stipulations were filed at the beginning of trial on December 13, 1983 (R. 238).

The fact stipulations pursuant to Rule 11(b) of the Rules of the Tax Division of the Superior Court recited in one document most of the numerous factual statements set forth in the Petition and admitted by the District's Answer including the amounts of the additional taxes and contested assessments, the timely payment of the additional taxes, the amounts of the prior timely annual assessments and the taxes paid, the details of the various written communications from the District describing its various actions with respect to the subject assessments and the earlier attempted annual supplemental assessment for Tax Year 1982 which initiated the events leading to this litigation and which the District by Robert Klugel of the Department

of Finance and Revenue had informed the taxpayer's counsel was illegal and promised it would be withdrawn with a corrected tax bill to be sent based on the annual assessment and that an administrative appeal to the Board of Equalization and Review was unnecessary (R. 238 *et. seq.*). The stipulations did not include further facts admitted in the Answer and discussed below in the Statement of Facts.

At the trial on December 13, 1983 before Judge Iraline Barnes, Mr. Klugel was the only witness called by the taxpayer and he testified pursuant to a subpoena *duces tecum*. Mr. Klugel's testimony on direct examination, cross-examination and re-direct (Supp.R. 12-55) briefly summarized was that he agreed with the taxpayer's summary of events leading to the subject assessments, that he had promised that a corrected tax bill for Tax Year 1982 reflecting taxes on the annual assessment would be sent and that the taxpayer had not filed an administrative appeal based on that promise, and that he had never informed the taxpayer that the District was not going to perform that promise and that instead he had been instructed by Mr. Aguglia, Assistant Corporation Counsel, that the property be subject to an omitted property assessment. Mr. Klugel also testified that the property's assessment record including the assessment rolls stated the property's annual assessment for each year and that the assessment record card did not show any omitted property assessment from October 19, 1981, the date the subject assessments were supposedly made, until July, 1982 when at the time of his deposition in this case he ordered that certain entries be made on the card and further that the entries were incorrect. The witness testified that the assessors had reviewed the property beginning in 1977, made periodic notations as to the progress of construction until completed in 1980 and that the taxpayer had provided all the required information and had done nothing to hide any relevant facts. In his testimony, Mr. Klugel admitted that

no other property which had received a supplemental assessment at the same time had been subject to an omitted property assessment. At that point, taxpayer renewed the request for admission on these points to which the District objected stating that the witness had now testified to the requested admissions and the court sustained the objections (Supp. R. 43).

At the conclusion of Mr. Klugel's testimony, the taxpayer rested its case, the District did not move for judgment nor present any witnesses (Supp.R. 57, 60). Following final argument by counsel for both parties, the court took the matter under advisement with each counsel to submit proposed findings and conclusions on January 6, 1984 (Supp.R. 79). Taxpayer filed its proposed findings and conclusions (R. 243) as did the District (R. 261) although the District's were not captioned as proposals.

Subsequently, on May 15, 1984, the trial court, Barnes, J., entered an opinion and order dated May 14, 1984 (R. 272) including Findings of Fact and an analysis and conclusion. 112 Wash.L.Rptr. 1317 (July 3, 1984). The court ruled that the subject assessments were imposed legally. In reaching that conclusion, the court ruled that the statute was susceptible to two meanings, one that a portion of the property could not be omitted and another that a portion of a property could be omitted and retroactively assessed. The court adopted an interpretation of the statute favorable to the District and held that an omitted property assessment could apply to only the improvements on a tax lot, that the assessor had not previously noticed the improvements and that equitable considerations favored the District. The court also held that the assessments were timely.

The taxpayer then filed a motion for reconsideration and rehearing pursuant to Rule 9(a) of the Rules of the Tax Division of the Superior Court (R. 289) which was opposed by the District (R. 329). The taxpayer also filed a motion

for leave to file a reply and a reply to the District's opposition (R. 334, 336). By order entered December 10, 1984, (R. 346) the trial court, Barnes, J., denied the motion for reconsideration and rehearing. This appeal followed.

STATEMENT OF THE FACTS

The property which is involved in this litigation is lot 90 in Square 140 known as 1111 19th Street, N.W. in the District of Columbia. The taxpayer is the owner of the property and is obligated to pay all real estate taxes assessed on the property. Prior to the so-called "omitted property" assessments in question, the assessment record for this property as shown in the record on appeal includes the relevant assessment history including amounts of annual assessments on the timely payment of all taxes assessed and the District's ongoing monitoring and review of the construction of the building (improvements) beginning in 1977. The assessment record consists of the permit card (Petitioner's Ex. 4), the Assessment Record Card (Petitioner's Exs. 3 and 5) and the Assessment Rolls for the relevant years (Petitioner's Exs. 6 and 7) and as described in the trial testimony by Mr. Klugel (Supp. R. 12-55).

Tax Year 1980: On or about March 1, 1979, the taxpayer received a notice of annual assessment (D.C. Code §47-820, 1981 ed., formerly §47-641) for Tax Year 1980 in the amount of $4,715,100, as of January 1, 1979. No administrative appeal was filed with respect to this assessment. The taxes assessed in the amount of $86,286.34 were timely paid. As of and prior to the valuation date of January 1, 1979, the District's assessment record states that building plans were submitted 2/7/77, that the property was inspected 12/17/77 and that the property was under construction on 6/20/78 and 11/20/78. (R. 238, Petitioner's Ex. #4.)

Tax Year 1981: On or about March 1, 1980, the taxpayer received a notice of annual assessment (D.C. Code §47-

810, 1981 ed., formerly §47-611) for Tax Year 1981 in the amount of $5,762,900 as of January 1, 1980. No administrative appeal was filed with respect to this assessment. The taxes assessed in the amount of $122,749.78 were timely paid. In the interim from January 1, 1979 to January 1, 1980, the valuation dates for Tax Years 1980 and 1981, the District's assessment record file states "6-15-79 50% complete". (R. 239, Petitioner's Ex. #4.)

Although the case does not involve any claim for Tax Year 1982, the events which set in motion the assessments at issue here began in Tax Year 1982.[3]

On or about March 1, 1981, the taxpayer received a notice of annual assessment (D.C. Code §47-820, 1981 ed., formerly §47-641) for Tax Year 1982 in the amount of $5,762,900, as of January 1, 1981, a copy of the notice is attached to the Petition as Exhibit A (R. 10). In the interim from January 1, 1980 to January 1, 1981, the valuation dates for Tax Years 1981 and 1982, the Department's assessment record file states "100% complete . . . 5/29/80". (R.239, Petitioner's Ex. #4.)

To recapituate for easy reference, the following facts were established from the District's written assessment record. (Petitioner's Exs. 3, 4, 5, 6, 7, 8 and 9).

(1) In February, 1977, the taxpayer was issued a building permit and submitted building plans for the improvements.

---

[3] The "omitted property" assessments originally included Tax Year 1982. Subsequently, in February, 1982, the District sent a notice of a second half supplemental assessment effective for the second half of Tax Year 1982 purportedly under the authority of D.C. Code §47-830 (1981 ed.). The taxpayer challenged the legality of that assessment in an administrative appeal before the Board of Equalization and Review and in a court suit (Tax Docket 3159). During the Court proceedings, the District conceded the illegality of the assessment and by order filed (Fauntleroy, J.) June 1, 1982, the taxpayer received judgment. (D.C.App. #82-917 dismissed as moot.)

(2) The District of Columbia assessor inspected the property in December, 1977.

(3) The property was assessed as of January 1, 1978 for Tax Year 1979 and the assessment was increased from $1,444,130 to $3,588,715.

(4) The District of Columbia assessor inspected the property on June 20, 1978 and November 20, 1978 and made notations that it was "under construction".

(5) The property was assessed as of January 1, 1979 for Tax Year 1980 and the assessment was increased from $3,588,715 to $4,715,100.

(6) The District of Columbia assessor inspected the property on June 15, 1979 and made notation that it was "50% complete".

(7) The property was assessed as of January 1, 1980 for Tax Year 1981 and the assessment was increased from $4,715,100 to $5,762,900.

(8) In April, 1980, the taxpayer's management agent wrote to the District of Columbia inquiring as to whether an income and expense form was required for this property.

(9) On May 29, 1980, the District of Columbia assessor inspected the property and made the notation of "100% complete".

(10) The property was assessed as of January 1, 1981 for Tax Year 1982 in the amount of $5,762,900.

(11) On or before April 1, 1981, the taxpayer filed the required income and expense form for the subject property for 1980.

(12) On June 24, 1981, the Department of Finance and Revenue made an annual supplemental assessment of $15,113,100 on the improvements on

the property for a total assessment of $20,876,000.

(13) The property and its assessment appeared on the Assessment Roll for each of the years in question.

On or about September 3, 1981, the taxpayer's management agent was notified by the agent for the lender (mortgagee), who escrows and issues payment of real estate taxes for this property, that the total annual taxes listed in tax billings for the first half of Tax Year 1982 was $444,675.84. On September 11, 1981, taxpayer received a "Notice of Property Assessment for Tax Year 1982", dated September 8, 1981, stating an increase in total assessment for Tax Year 1982 from $5,762,900 to $20,876,000 with the stated "Reason For Change: Permit Work:"; a copy of that notice is attached to the Petition as Exhibit C (R. 15). The notice further informed the taxpayer that an appeal to the Board of Equalization and Review could be filed "between September 1 and September 30 . . .", a right provided by §47-710, but which taxpayer did not exercise in reliance on the Department's promise that no appeal was necessary. (R. 239-240, Petitioner's Ex. #1, Supp. r. 18-19.)

Prior to the receipt of this notice, in a series of telephone conversations with Mr. Klugel of the Department of Finance and Revenue prompted by taxpayer's counsel's efforts to determine the reasons for the tax billing amount, Mr. Klugel stated that a supplemental notice of assessment (under then D.C. Code §47-710, 1973 ed., now §47-829, 1981 ed.) had been mailed. When informed that the assessment would be appealed to the Board of Equalization and Review ("the Board") because there had not been any building activity subject to a supplemental assessment during the relevant time period (January 1, 1981 to June 30, 1981 for Tax Year 1982), Mr. Klugel promised that the assessment would be cancelled and that no appeal was

necessary. Mr. Klugel also promised a corrected tax bill based on the Tax Year 1982 annual assessment of $5,762,900 would be sent. Consequently, the taxpayer did not file an administrative appeal. (Petitioner's Ex. #1, Supp. R. 13-19.) Counsel for the taxpayer called Mr. Klugel periodically including on October 27, 1981 to inquire as to when the corrected bill would be received and Mr. Klugel continued to state that the corrected bill would be sent. (Petitioner's Ex. #1, Supp. R. 18.) Mr. Klugel did not perform his promise (Supp. R. 15, Petitioner's Ex. #1) and never informed the taxpayer or its counsel that the District was not performing the promise (Supp. R. 18-19).

Instead, on November 12, 1981, taxpayer's counsel received in the mail a copy of a letter dated October 19, 1981 from the Department of Finance and Revenue by Robert L. King, Acting Associate Director stating that the use of §47-710 for permit work was untimely and that "... we have concluded that the improvements to the property have *never* been assessed since construction began in 1977. Therefore, pursuant to §47-712, we have assessed the improvements to the subject property for tax years 1980, 1981 and 1982." The letter proceeded to state that tax bills were enclosed for payment within 30 days, i.e., on or before November 18, 1981. A copy of the letter of October 19, 1981 and the enclosures are attached to the Petition as Exhibits D-1, D-2, D-3 and D-4 (R. 17-20). The taxpayer received the original of the letter on or about November 9, 1981. The delay in receipt of the letter is unexplained. Subsequently, at the request of the taxpayer, through counsel, the date for response to the purported tax bills was extended by the Department to December 9, 1981 and then to December 31, 1981 (R. 240-241).

The enclosures to the Department's letter of October 19, 1981 (R. 17-20) are more specifically described as follows (R. 241):

(a) Exhibit D-2 to the Petition is dated 10/16/81 and states the following: "Payer's Receipt"; "Fiscal Year 1980"; "Total Assessed Value 12232100"; Total Tax 137,561.10" and states further "Return all copies of this Notice with Payment to Department of Finance and Revenue." (R. 18)

(b) Exhibit D-3 attached to the Petition is dated 10/15/81 and states: "1981 Second Half Tax Bill Class III"; "ADMIN ERROR"; "IMPS ADDED"; "TOTAL ASSESSMENT AT MARKET VALUE 20797000"; "Payment due by Mar 31 81" "FULL YEAR 32022632". (R. 19)

(c) Exhibit D-4 attached to the Petition is dated 10/15/81 and states: "1982 FIRST HALF TAX BILL CLASS III"; "IMPS ADDED"; "ADMIN. ERROR"; "TOTAL ASSESSMENT AT MARKET VALUE 20797000"; "FIRST HALF 22148805"; "SEP 15 81 FULL YEAR 44297610". (R. 20)

The tax billings were timely paid on December 31, 1981. (R. 241)

After receipt of the Department's letter dated October 19, 1981, the taxpayer, through counsel, on November 16, 1981 filed an administrative appeal from the §47-710 assessment with the Board of Equalization and Review, as of September 10, 1981 (R. 24). A hearing on the appeal was held November 19, 1981, at which time the District appeared through counsel and argued that the §47-710 assessment had been withdrawn and the Board had no jurisdiction to hear the appeal. By letter dated December 7, 1981 (R. 25), incorporated by reference and made a part hereof, the Board informed Petitioner that it would take no action on the appeal because of the District's position that the §47-710 assessment had been withdrawn (R. 241-242).

The Tax Year 1980 assessment in the amount of $4,715,100, which the taxpayer did not appeal, became

final on July 1, 1979. The Tax Year 1981 assessment in the amount of $5,762,900, which the taxpayer also did not appeal, became final on July 1, 1980 (R. 2, 54).

As required by law, D.C. Code § 47-643(a) (1973 ed., now §47-823(a), 1981 ed.), the assessed value of the subject property was included in the published assessment rolls for both Tax Year 1980 and 1981 as well as Tax Year 1982 (Supp. R. 31-34, Petitioner's Exs. 6 and 7).

Since construction of the property's improvements began in 1977, the District, by various assessors, inspected, monitored, reviewed and considered the construction. Beginning in February of 1977, the District noted that building plans had been filed. The District inspected the property's improvements on December 17, 1977 and the notation s.n.y. meaning "see next year" was made. The District then inspected the property on June 20, 1978 making the notation that improvements were under construction and again made an inspection and notation on November 20, 1978. Then on June 15, 1979 the property was inspected and it was noted that the construction was 50% completed followed by an inspection and notation on May 29, 1980 that the building was completed [sic] (Petitioner's Exs. 3 and 4, Supp. R. 23-25). With respect to this assessment record, Mr. Klugel described the District's ongoing review of the construction progress as not sufficiently complete to warrant the under roof assessment on June 20, 1978, that the improvements were considered 50% complete on June 15, 1979 and that the building was considered 100% complete on May 29, 1970 (Petitioner's Ex. 3, p. 2).

During the relevant time period for the subject tax years (calendar years 1979 and 1980) when the District was reviewing the construction progress and making annual assessments, the taxpayer did not do anything which would have interferred with the assessment process (Supp. R. 34-35). The taxpayer in fact wrote to the District in April,

1980 specifically referencing this property's office building and requesting whether an income-expense form was required for calendar year 1979 (Supp. R. 36-37 and Petitioner's Ex. 8) and in April, 1981 the taxpayer filed an income-expense form for calendar year 1980 (Supp. R-37-38, Petitioner's Ex. 9).

The assessment record card for this property as the record card existed on October 19, 1981, the date of purported assessments at issue did not reflect that any such assessments had in fact been made. The purported assessments were not in fact noted on the assessment record card until July, 1982 when Mr. Klugel ordered that certain entries be made during discovery in this case (Petitioner's Exs. 3 and 5, Supp. R. 28-29) and the entries ordered by Mr. Klugel some nine months after the claimed assessments were incorrect reflecting only a second-half assessment for Tax Year 1980 (Supp. R. 50, Petitioner's Ex. 5).

At the time of the events in September and October, 1981 when Mr. Klugel informed the taxpayer that the annual supplemental assessment for the Tax Year 1980 was invalid, that no appeal was necessary and he promised that a corrected tax bill based on the Tax Year 1982 assessment would be sent, he took similar actions with respect to several other unrelated properties which did not, however, receive "omitted property" assessments (Supp. r. 39-43). Indeed following these promises, Mr. Klugel wrote a memorandum to Mr. Richard Aguglia, Assistant Corporation Counsel in the Tax Division of the Office of the Corporation Counsel requesting Mr. Aguglia to determine the applicability of an omitted property assessment (Petitioner's Ex. 2, Supp. R. 19-20). Mr. Aguglia then directed the Department to proceed with omitted property assessments (Supp. R. 48).

Other then the statutory language (D.C. Code §47-712, 1973 ed. now §47-831, 1981 ed.) there are no written rules or regulations governing "omitted property" assessments

(Supp. R. 43-44). The letter and tax bills sent to the taxpayer purporting "omitted property" assessments (R. 17-20) do not include any of the notice requirements set forth in D.C. Code §47-823(c) (1981 ed., formerly D.C. Code §47-643(c)). (Supp. R. 45-46.)

ARGUMENT

I. INTRODUCTION

The taxpayer appeals from the orders of the trial court sustaining the legality of "omitted property" assessments for Tax Years 1980 and 1981 with the levying of additional taxes and denying reconsideration and rehearing of that result.

Taxpayer seeks reversal of these orders on several grounds.

The trial court held, but taxpayer does not agree, that the applicable statute was ambiguous and the court broke the tie in favor of the District. By these rulings, the court violated every basis tenet of judicial review in the application of taxing statutes. Assuming without conceding that the statute is ambiguous, tax laws must be strictly construed in favor of the taxpayer and equitable considerations, particularly in favor of the taxing authority, are not permitted.

The trial court concluded that the statute was not clear and then further concluded that the District's allocation of zero value to the improvements constituted an "omitted property". As discussed in greater detail below, these conclusions are erroneous as a matter of law.

In making the determinations of each annual assessment, the District inspected, reviewed, considered and used the known information of changes in the property during various phases of construction all as shown on the assessment records. There is no authority for the District's

later change of mind resulting in different assessments and exactions of additional tax.

To reach the result below, the trial court impermissibly relied on equitable considerations in favor of the District's need for tax revenues. The reliance on equitable factors has no place in the resolution of a taxpayer's rights and the taxing authority's needs or other motivations are irrelevant.

The property had been assessed and taxed and appeared on the assessment rolls for each of these tax years. The property could not, therefore, be subjected to assessment as an "omitted property" since it had escaped neither assessment nor taxation. The law of the District of Columbia is quite clear that an extraordinary assessment under the "omitted property" statute can only apply to the indeed rare circumstances in this urban jurisdiction where a property has not been previously assessed and taxed. That rare circumstance does not apply here and the assessments and levy of additional taxes were not legally imposed.

In sustaining the assessments, the lower court ignored other relevant evidence which could only support the taxpayer's position. The District made an illegal supplemental assessment, then promised the taxpayer that no appeal was necessary and the correct taxes would be billed, a promise on which the taxpayer relied to its detriment. Instead of performing its promise and without informing the taxpayer that it would not perform, at the direction of the Office of the Corporation Counsel, the District sent various pieces of paper, none of which complied with statutory requirements, imposing additional taxes. No other property owner whose property had an illegal supplemental assessment at that same time was subjected to any further action or claim that the property had been omitted and escaped taxation.

The constitutional guarantees of due process and equal protection under the law prohibit such treatment directed only to one taxpayer. It is also quite clear that the public assessment record for this property did not reflect any purported "omitted property" assessments at any time at or near the alleged date of the assessments. It was almost a year later when the District altered the record to attempt to show the assessment increases and even the record entries did not conform to the facts asserted by the District.

None of the District's actions commencing in the fall of 1981 conform to the law. Even assuming that the law could conceivably authorize a retroactive assessment of a portion of a property as the trial court found and which the taxpayer disputes, the law does require immediate and timely action. Here, at a minimum, the District did not act timely and that factor alone should have barred the assessments.

The trial court's rulings are clearly erroneous, not supported by the evidence, impermissibly rely on equities in favor of the District, fail to uphold the taxpayer's rights under the Constitution and other legal claims and require reversal.

II. THE TRIAL COURT'S FINDINGS, CONCLUSIONS AND DENIAL OF RECONSIDERATION ARE CONTRARY TO THE LAW AND ARE NOT SUPPORTED BY THE EVIDENCE

A. The Trial Court Erroneously Concluded That the Statute is Ambiguous and Erroneously Construed the Statute Against the Taxpayer and in Favor of the District

The taxpayer has never conceded that improvements or any other portion of a property can be subjected to an "omitted property" assessment under the laws of this jurisdiction. D.C. Code §47-831 (formerly §47-712).[4] The trial

[4] The D.C. Code citations in the Argument are to the 1981 edition with prior code references in parenthesis.

court, however, concluded that the statute was susceptible to two meanings and went on to conclude that the meaning which would sustain the assessments should control because of equitable considerations in favor of the District. In so holding, the lower court violated every basic premise of judicial review of the applicability of taxing statutes,

> *[I]t is elementary that tax laws are to be interpreted liberally in favor of 'taxpayers'* " and "[D]oubts must be resolved against the government and in *favor of taxpayers, Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 508, 52 S.Ct. 260, 263 (1932).

If a taxing statute is found to be susceptible to more than one meaning as the trial court concluded, but the taxpayer does not agree, it is to be given the meaning most favorable to the taxpayer.

Once a court determines that a taxing statute can have two (or more) meanings, the court has no choice but to apply the meaning most favorable to the taxpayer.

The trial court's opinion and order reversed without any arguable justification this overriding principle of jurisprudence in the construction of tax statutes. The long established principle requires that where differing interpretations of revenue laws are possible, the tax statutes must be construed strictly against the taxing authority and liberally in favor of the taxpayer. This principle is found almost word for word in *Miller*, *supra*, wherein the Court in 1932 held it to be "elementary" that tax laws be interpreted liberally in favor of taxpayers where the Court found that the Commissioner had wrongfully enlarged the definition of oleomargarine to apply to the tax petitioner's product. Earlier, in *Gould v. Gould*, 245 U.S. 151, 38 S.Ct. 53 (1917), the Court recognized the established rule that, in construing tax statutes, all doubts should be construed "most strongly" against the government and in favor of the citizen.

These ancient precedents have been often repeated both in the Supreme Court and in lower courts in the last 70 years. In *U.S. v. Merriam*, 263 U.S. 179, 44 S.Ct. 69 (1923), the Court followed *Gould* when it stated that where words in the levying statute are doubtful, the doubt must be resolved in favor of the taxpayer. In *Busse v. Commissioner of Internal Revenue*, 479 F.2d 1147 (7th Cir. 1973) the Court cited *Merriam, supra*, for the principle that in construing revenue statutes in a doubtful situation, the taxpayer is entitled to the benefit of the doubt. See also *B&M Company v. U.S.*, 452 F.2d 986 (5th Cir. 1972); *Tandy Leather Company v. U.S.*, 347 F.2d 693 (5th Cir. 1965); *Estate of Renick v. U.S.*, 687 F.2d 371 (Ct. Cl. 1982); *Circle Discount Corp. v. U.S.*, 211 F.Supp. 743 (D.D.C. 1962).

In overriding this long established principle of judicial interpretation, the trial court buttressed the result solely by reliance on equitable considerations. Throughout the opinion, to avoid the required result from *Miller*, *Gould* and *Merriam*, the court cited "equitable considerations." The court's opinion made clear that a construction of the statute in favor of the District as the taxing authority was chosen because of the court's perception of ". . . compelling inequities as an inevitable result of the kind of case presented in this action." (R. 287-88) Ignoring that this underlying suit is an action at law, the court below made

frequent reference to equitable factors.[5]

The court's assumption that the taxpayer could be spared a heavier tax burden if the assessments were not sustained is irrelevant. The issue before the court was not who should be rewarded or who should be punished. That sort of argument was put to rest at least as early as 1923 in *Merriam* when Mr. Justice Sutherland noted with approval the *Gould* opinion and quoted the House of Lords opinion by Lord Cairns in *Partington v. Attorney General*, L.R. 4 H.L. 100, 122:

> I am not at all sure that in a case of this kind—a Fiscal case-form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently in the spirit of the laws the case might otherwise appear to be. *In other words, if there be admissible*

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[5] There follows illustrative language that the court below used to justify equitable factors favorable to the District:

> . . .the Court cannot reward the taxpayer and punish the District (R. 287)
>
> . . .notice to the taxpayer (*Id.*)
>
> . . .the taxpayer should not be permitted to avoid his share. . .[of taxes] (*Id.*)
>
> . . .this policy is not inconsistent with (*Id.*)
>
> . . .the philosophy underlying the omitted property provision is one of fairness in apportioning the tax burden. . .(*Id.*)
>
> It followed logically that a taxpayer having notice that his property has escaped taxes which would properly be due, should not stand to benefit by avoiding payment of an equitable share of the tax burden. (*Id.*)

> *in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.* (Emphasis supplied), quoted in *Merriam*, 263 U.S. *supra* at 188, 44 S.Ct. *supra* at 71.

This guiding precent has never been modified and was repeated in 1930 in *Crooks v. Harrelson*, 282 U.S. 55, 51 S.Ct. 49 (1930) and is quoted in the dissent to *U.S. v. de Bonchamps*, 278 F.2d 127, 136 (9th Cir. 1960). Only the "letter of the law" can apply and any doubt must be resolved in favor of the taxpayer. Any notion of the "spirit of the law" having any relevance is clearly wrong.

In *D.C.R.L.A. and Bresler & Reiner, Inc. v. D.C.*, 106 Wash.D.L.Rptr. 793, May 2, 1978 (Tax Docket 2298) the court had before it a similar argument. In ruling for the taxpayer by strictly construing the "omitted property" tax assessment statute against the District, the court stated:

> What applies to the small taxpayer applies equally to the taxpayer who stands to reap a substantial windfall should he prove that his property is not escaped property. Once the question is posed, the amounts involved are insignificant even though one taxpayer may evoke greater sympathy than another. 106 Wash.D.L.Rptr. *supra* at 797.

An assertion that a taxpayer must be penalized and pay additional taxes because the taxing authority later changes its mind has no place in the application of tax statutes.

"The argument that the court should interpret a tax statute more equitably has been raised and rejected many times by the courts." *Estate of Renick v. U.S.*, 687 F.2d, *supra* at 376. It must again be rejected in this case.

The court's use of equity to decide in favor of the District is interwoven with references to certain unsupported statements that the taxpayer had "notice" that its prop-

erty was "omitted" and had been escaping taxation. These statements truly beg the question: notice of what? Could the court mean that the taxpayer's receipt of statutory notices of annual assessments, the timely payment of the taxes so assessed, and the appearance of the property on every assessment roll as required by statute mean nothing. Does the court mean that a taxpayer is required *by equity* to pierce the wall behind these official actions and assume that at some later time—years, decades, centuries—that the District would change its mind and vary its former actions? Perhaps, and only perhaps if these were duly published regulations which put all taxpayers on "*notice*", to use the trial court's descriptive term, that all assessments were to be left open indefinitely for the District's later discretion any judgment, then perhaps the District could make out a *legal* defense—but never an *equitable one* under the facts of this case. There are of course no such authorities upon which the District could rely. Instead, the trial court implied that the taxpayer was somehow at fault when it did not appeal any of its annual assessments and paid the taxes, thus "precluding reassessment" (R. 272). The opinion's implication is that if the taxpayer had appealed the assessments, the District could have changes its mind earlier. Under all of the guiding principles of jurisprudence, no such stretch of imagination has ever been approved.

In its Motion for Reconsideration (R. 289) and Reply to the District's opposition (R. 336), the taxpayer reminded the trial court of the governing principles and that none of the cases cited by the District for its argument that it was entitled to equitable favors were as represented. In the order denying reconsideration and rehearing, the court simply magnified its error. First, the court characterized the District's position as citations where the District of Columbia Court of Appeals ". . . applied equitable considerations in favor of the government *to insure that taxpayers consistently complied with the District's laws.*"

(Emphasis supplied). (R. 343) Nowhere does the court explain or even comment how that characterization could conceivably apply to this taxpayer and this case. The order went on to reemphasis that the court "had weighed the equities" in deciding to sustain the assessments (R. 344).

As demonstrated, such reliance on equitable factors has no place in the resolution of this case.

B. The Statute is Clear That "Omitted" Means That the Entire Property was not Previously Assessed or Taxed

Although it is established that the property had been previously assessed and taxed as discussed in detail below, we now must turn to the statutory provision for so-called "omitted properties" which the trial court found to be ambiguous. At the time the District supposedly made the "omitted property" assessments at issue the statute provided as follows with the 1981 changes in brackets:

> §47-712. Assessment of omitted property—Voided assessments, reassessment of property.
>
> If the board of assistant assessors [if the Department of Finance and Revenue] shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years, or has been so assessed that the assessment made was void, it shall be their [a] duty at once to reassess this property for each and every year for which it has escaped assessment and taxation, and report the same, through the assessor [Assessors] to the collector of taxes [Collector of Taxes] who shall at once proceed to collect the taxes so in arrears as other taxes are collected: *Provided*, That no property which has escaped assessment and taxation shall be liable under this section for a period of more than three [3] years prior to such assessment, except in the case of property involved in litigation. In addition

> to the duties of the assessor [Assessor] hereinbefore provided, it shall be the duty of the assessor [Assessor] upon reassessment as herein [hereinbefore] provided to notify the taxpayer by writing of the fact of such reassessment. Any person aggrieved by any reassessment made in pursuance of this section may, within six [6] months after notice of said reassessment, appeal from said reassessment in the same manner and to the same extent as provided in section 47-2403 and 47-2404. [47-3303 and 3304]

The quoted statutory provision is the entire written authority; there are no published rules or regulations governing any such assessments. Based on the clear language of the statute, this property was not "omitted"; it had escaped neither assessment nor taxation.

The trial court nonetheless found that the statute was susceptible of two meanings; one, that only an entire property could be omitted and two, that a portion of the property could be omitted as the court ultimately concluded.

To reach that conclusion, the court looked to a definition of "real property" in D.C. Code §47-802 (formerly 47-622), although the court's citation was to §47-820, which is the real estate identified by lot and square together with the improvements. The court then looked to the policies and underlying considerations in the entire statutory real estate assessment provisions. In so doing, the court relied heavily on equitable considerations favorable to the District as discussed above. The court, however, ignored that with few exceptions but including the "omitted property" statute, the assessments provisions looked to by the court for philosophical support were enacted in 1973 (or later) in a tax reform process specifically designed to cure the documented abuses in the District's annual assessments. (D.C. Code §47-801, formerly §47-621).

The "omitted property" statute, however, was enacted first in 1896 and has remained in effect since that time with only minor revisions. As one would expect, in an urban area, this statute has been rarely invoked and never successfully until the lower court's opinion in this case.

As acknowledged in the trial court's opinion, there have been only two prior reported cases which involved this statute. The most recent of the two, *D.C.R.L.A. and Bresler & Reiner, Inc. v. District of Columbia, supra*, is remarkably similar to this case except for the result. In that earlier case, precisely as here, the District claimed annual supplemental assessment (then §47-710, now §47-829), which the taxpayer argued was illegal (i.e., "untimely"), the District then changed its mind during trial of the taxpayer's suit and claimed it was really assessing the property as an "omitted property". The trial court concluded, and the District did not appeal, that based on the assessment record the property had been previously assessed and taxed. In that case, the District had attempted to argue that one of the two buildings had not been included in the assessment but the court ruled that the District could not come in later and change its mind and vary the official assessment record. The court refused to credit the District's position that a portion of the property had been "omitted" when the assessment record shows otherwise; the portion which the District claimed to have omitted was known to exist on the annual assessment date and there was no omission in the assessment. This is the precise same case as this appeal.

In an earlier case, *Trustees of St. Paul Methodist Episcopal Church v. District of Columbia*, 94 U.S.App.D.C. 78, 212 F.2d 244 (1954), the "omitted property" assessment contested was set aside because it was not made by the statutorily empowered official. The case is relevant here since the assessments were ordered by the Office of the Corporation Counsel and not by the legally empowered officials, "the Board of assistant assessors" (1973 ed.) and

the "Department of Finance and Revenue" (the 1981 ed.), as described below.

Although the Court in *Trustees of St. Paul* was able to resolve that case without reaching the further issue of whether the property had been "omitted" for previous years, the trial court here tried to justify a broader reading of the statute with a selected quotation to support the opinion here. Keeping in mind that in *Trustee of St. Paul's*, the property had been previously exempt from taxation and the court did not reach that issue on the merits, the court significantly did refer to "*parcels of real estate*" (emphasis supplied), 94 U.S.App.D.C. *supra* at 82. Taking together the opinions in *Trustees of St. Paul* and *Congregational Home v. District of Columbia*, 92 U.S.App.D.C. 73, 202 F.2d 808 (1953) to which it referred, the assessment process is recognized and it is demonstrated that the "omitted property" assessment authority's place in the statutory framework applies only to parcels of real estate which have been omitted from the assessment rolls.

So, to the extent that the applicability of the "omitted property" assessment in the District of Columbia has been litigated, the courts' conclusions are entirely consistent with this taxpayer's position.

Ignoring the clear language of the statute, the previous judicial interpretations and the undisputed assessment record, the lower court concluded that the District's allocation of zero value to the improvements constituted an omitted property. The statute, D.C. Code §47-821(a) (formerly §47-642(a) requiring the District to identify separately the value allocated to the land and the value allocated to the improvements, is not an assessment authorization and the District has successfully argued that no separate assessment of either component, land or improvements, is authorized by the provision. As argued by the District and the courts have agreed, the assessment is a single number, as shown on the assessment rolls and

on the tax rolls, and the allocation as between land and improvements is of no relevance. See *D.C.R.L.A. and L'Enfant Plaza v. District of Columbia*, 107 Wash.D.L.Rprt. 949, *supra*; *D.C.R.L.A., et al. v. District of Columbia*, Tax Docket 2370, D.C: Super.Ct., (Opinion and Order) 1976; *D.C.R.L.A. and L'Enfant Plaza v. District of Columbia*, Tax Docket 2290, D.C. Super.Ct., 1975 Opinion) and *D.C.R.L.A. and Bresler & Reiner, Inc. v. District of Columbia*, Tax Dockets 2448 and 2512, D.C. Super.Ct., 1983 (Memorandum Order).

The insignificance of the identification of the allocations is amply demonstrated by the tax bills involved here. (R. 18-20). There is no separate listing of allocation or the taxes. The amounts of the total assessment and the total taxes are what are stated. The letter which accompanied the tax bills (R. 17) does not comply with any of the statutory notice requirements (D.C. Code §47-824, formerly §47-645).

The only statutory provisions which provide for assessments triggered by improvements are the supplemental assessments authorized by §§47-829, 830 (formerly §§47-710, 711). There is no such thing as an "omitted" improvement assessment in the District of Columbia.

C. The Leading Cases in Other Jurisdictions Interpret Statutes Similar to the District's Statute; That is They Allow Omitted or Escaped Assessments only if the Entire Property had not been Previously Assessed and Taxed

To the extent that similar issues have arisen in other jurisdictions with similar statutes, the authorities support this taxpayer. The opinion of *Leyh v. Glass*, 509 P.2d 259 (Okla. 1973) dealt with assessment statutes similar to the District's, where the "omitted property" statutes also did not provide for assessing "omitted" improvements but also like our statute, required the values of land and improvements to be separatedly identified. The *Leyh* court found,

after reviewing all of the relevant statutes that improvements were not a separate class of property and could not constitute "omitted" property. Similarly, *Block Pitt Invest. v. Assessor of Bernadillo Cty.*, 86 N.M. 589, 526 P.2d 183 (1977) held that improvements could not be separately assessed under a "forced" (omitted) assessment statute. The case of *Tradewell Stores, Inc. v. Snohomish County*, 69 Wash.2d 352, 418 P.2d 466 (1966), extensively discussed in *D.C.R.L.A.*, Tax Docket 2298, *supra*, held that the improvements had not been "omitted". Significantly, however, if these improvements had been omitted, the Washington assessment statutes had a specific statute authorizing assessment of "omitted" improvements.

The trial court did not discuss the *Leyh* and *Block Pitt* opinions but did discuss the Florida opinions which have dealt with assessment of improvements as "omitted" property. The case of *Korash v. Mills*, 263 So.2d 579 (Fla. 1972) found that improvements had been omitted and the subsequent retroactive assessment on the improvements on the facts of that case was not an assessment increase resulting from a change in judgment. The *Korash* opinion, presumably correct on the facts before it, nevertheless appears to be an aberration in Florida decisions concerning "omitted" properties. The case of *Markham v. Friedland*, 245 So.2d 645 (Fla.Dist.Ct.App. 1971) decided by the intermediate appellate court a year earlier and citing a long list of Florida case law refused to uphold an "omitted" property assessment on improvements. The *Korash* opinion discusses but did not distinguish or overrule *Markham*. Subsequently, the intermediate appellate court, despite *Korash*, in *Underhill v. Edwards*, 400 So.2d 129 (Fla.Dist.Ct.App. 1981) followed the general rule in Florida that a property has not escaped taxation after the tax roll has been certified for the given year and the taxes paid.

The majority of the authorities, as recognized by the trial court do appear to be in agreement that an "omitted

property" assessment cannot be upheld if the retroactive assessment is a change in the taxing authority's judgment.

The trial court, however, erroneously concluded that the District's actions did not constitute a change in judgment. The court's opinion stated that "[T]his court cannot conclude that this is a case involving a previous exercise of judgment concerning improvements value." (R. 286) That conclusion is totally contradicted by the record. Initially, solely with reference to the District's construction record card (Petitioner's Ex. 4) documenting the ongoing monitoring of the property since 1977 all as detailed below and Mr. Klugel's analysis of that record both in writing (Petitioner's Ex. 2) and by his oral testimony (Supp.R. 21-24), the District continuously exercised judgment and then changed those prior actions by its actions in October, 1981.

A few quotations of examples from the record (*Id.*) conclusively demonstrate the point.

> "Construction was apparently in progress but not sufficiently complete *to warrant* the under roof assessment June 20, 1978."
>
> "June 15, 1979 the improvements were *considered* 50% complete . . ."
>
> "May 29, 1980 the building was *considered* 100% complete."
>
> "S.N.Y. notations means 'See next Year'."

With this extensive written record of the District's prior judgments, on June 24, 1981, the District purportedly made its initial change in judgment by setting in motion a supplemental annual assessment increase from $5,762,900 to *$20,876,000* and subsequently sent a letter and a tax bill stating that the "omitted property" assessment was an increase from $5,762,900 to *$20,797,000* for Tax Year 1982[6]

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[6] See footnote 3, *supra.*

the underscored different amounts are *prima facie* evidence of both an exercise and a change in judgment.

Having considered the property including its improvements continuously from 1977 to 1981 while increasing the total assessments from $1,444,130 for Tax Year 1978 to $5,762,900 for Tax Year 1981,[7] the District documented its prior judgments. It sought to cover up its subsequent exercise in judgment first by making no entry on the assessment record and then almost a year later fabricated entries on the assessment record to attempt to support its actions.

Regrettably against this uncontroverted background, the trial court relied on the District's after the fact and creative but totally unsubstantiated assertion that it had previously assigned no value allocation to the improvements and therefore years later could change its mind. Neither the District nor the lower court addressed the consequences of such an arbitrary, *ex poste facto* pronouncement. If at any one of the numerous assessment dates, the District had allocated $1, $100 or $1,000 to the improvements, as it easily and legally could have done, under the lower court's ruling, a subsequent "omitted property" assessment would be barred.

Despite the detailed assessment record, the lower court found that the ". . . construction and existence of the improvements simply had not been noticed by the assessor" (R. 286). No statement in the opinion could be less substantiated from the record. If the assessors and therefore the District did anything from 1977 onward, they noticed the improvements. They inspected them in person on sev-

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[7] Even if the assessments had not increased, the legal result would be the same; an "omitted property" assessment would be illegal given the District's ongoing consideration of the entire property. The steadily progressing assessment amounts for this property, however, further demonstrate the District's prior exercises of judgment which is later changed.

eral occasions and kept a written record describing each inspection visit. The District's assessors, repeatedly and continuously "noticed" the improvements.

Faced with this obvious result, the District argued and the trial court agreed, that the District could assert that the previous assessments did not include a portion of the property, i.e. the building or improvements. By law of course the building was included because the District as repeatedly documented by the assessment record, included it in the determination of the annual assessments.

If, however, the District had for whatever reason not known of the improvements, if they had been completely hidden and if the owner either intentionally or unintentionally kept the building's existence a complete and total secret, this taxpayer takes no position on whether the District could legally assess in those circumstances. There would still be no authority for an "omitted property" assessment for only a portion of the property. The District's statute, unlike some other jurisdictions as discussed above, does not provide for an assessment of "omitted" improvements.

None of those highly speculative facts exist here. Nevertheless, the trial court agreed with the District by the clearly erroneous conclusion that a zero allocation of value for the improvements had to mean that the building had not been assessed. By law and in fact this is untrue and incorrect as discussed below.

It is conceivable that the trial court was swayed by the District's self-serving trial testimony that the improvements had been "omitted from the assessment roll." The assessment rolls are of course in evidence and show conclusively that the property and its assessment are on the rolls. There cannot be on the face of the rolls any omission of improvements—the only requirement is that the property, the parcel or lot, appear on the roll, precisely as this property appeared.

Reliance on the identification of an unrelated requirement for value allocations instead of the assessment record was erroneous and not supported by the law and the evidence.

D. The Property was Previously Assessed and Taxed for Each of the Subject Tax Years

The initial inquiry in determining the valid applicability of an "omitted property" assessment under D.C. Code §47-831 should have been whether a property had previously escaped both assessment and taxation. It should be axiomatic that a negative response to that inquiry terminates any further analysis. In this case both the lower court and the District went to great lengths to avoid this clear result. For purposes of this appellate review, however, the evidence and the law demonstrate conclusively that this property was not "omitted" and could not be subjected to further assessment and taxation for Tax Years 1980 and 1981.

The taxpayer received notices of assessments for each year and timely paid the taxes. Beginning in 1977 and continuing to 1980, the owner was constructing the improvements on the property, opening the building for tenants and keeping the District fully informed including the voluntary notice to the District that the building had been open so that all income data reporting requirements could be satisfied. During this same time period, the District was periodically and continuously inspecting the property, viewing the construction progress, establishing assessments based on all known factors and determining not to make any supplemental assessments.

The District's actions during that time period were consistent with the statutory requirements of annual assessment in the District with limited statutory authority for supplemental assessments for specific factual events. The District's statutory assessment framework defines both when assessments are required and what precisely is as-

sessed at any assessment date. Every property is assessed every year as of January 1st valuation date for the tax year to begin on the following July 1st, precisely as was done for this property. (D.C. Code §47-820, formerly §47-641.) When determining the annual assessment the District is required to consider all information known and relevant to the property's value on the valuation date. In addition, in the interim calendar year between annual dates of assessment valuation, the District has two statutory authorizations for certain specific events: an annual supplemental assessment broadly characterized for new buildings erected or under roof between January 1st and June 30th (D.C. Code §47-829, formerly §47-710) and a more limited second-half supplemental assessment authority for new buildings erected and under roof during the period July 1 to December 31st (D.C. Code §47-830, formerly §47-711).[8]

As the record shows, the District reviewed and considered this property including the improvements when it made annual assessments beginning January 1, 1978 (for Tax Year 1979) when it increased the assessment from $1,444,130 for Tax Year 1978 to $3,588,715 and again when it made the annual assessment for Tax Year 1980 when it increased the assessment to $4,715,100 and again as of January 1, 1980 for Tax Year 1981 when it increased the assessment to $5,762,900.

The significance of these facts against the statutory assessment requirements is that the property was assessed and taxed.

In addition, during the same time period, the District reviewed or had the knowledge and opportunity to review the appropriateness of a timely supplemental assessment on July 1, 1977, January 1, 1978, July 1, 1978, January 1, 1979, July 1, 1979 and January 1, 1980.

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[8] Both supplemental assessment authorizations were amended effective for Tax Year 1984 (beginning July 1, 1983) by Title VII of Art. 5-29. The amendments are not relevant to the issues in this appeal.

The law requires that the assessment includes whatever property condition exists and is known or available to be known to the assessor on the valuation date. The only permissible interrelationship of the three assessment authorizations precludes the use of information known on an annual assessment date to be ignored and used later to justify a supplemental assessment. The District must act and is presumed to have acted at the annual valuation date and cannot act again until the next annual valuation unless new specific events permit a timely supplemental assessment. The statutory requirements in this respect have been applied in the Tax Division of the Superior Court and the District has concurred since none of the rulings were appealed and the District in fact consented to the final orders in some cases. *D.C.R.L.A. and L'Enfant Plaza v. District of Columbia*, 107 Wash.D.L.Rptr. 949, May 31, 1979 (Tax Dockets 2460, 2461, 2462, 2517 and 2518); *15th and L Street Associates v. District of Columbia*, Tax Docket 2471, D.C.Super.Ct., 1980 (consent order) and *1899 L Street Associates v. District of Columbia*, Tax Docket 2823, D.C. Super.Ct., 1981 (consent order).

Against this factual background and within the statutory requirements, the property was previously assessed and taxed for both of the subject tax years.

The trial court thus immediately went astray in the preamble to the opinion and order (R. 272) with the statement that the taxpayers' primary contention is that the District was aware of the construction and completion of improvements on the subject property. The taxpayer's primary contention was and is that the property had been assessed and taxed. By law and in fact the assessment and the taxes paid were based on the property's known condition on each of the successive valuation dates and this result cannot be altered by subsequent decisions to change the assessments.

Having demonstrated that the subsequent assessment increases were illegal the taxpayer was entitled to the reinstatement of the only valid assessments made according to law, the annual assessments for each year, and the refund of the additional taxes paid. *District of Columbia v. Burlington Apartment House Company*, 375 A.2d 1052 (D.C. 1977).[9]

E. Assuming the Authority to Assess, the District Did Not Act Timely

Assuming for the sake of argument that the District had legal authority to make "omitted property" assessments under the facts of this case, which is purely an assumption and not a concession as is clearly shown above, the District did not make timely assessments under the clear language of D.c. Code §47-831 or its predecessor, §47-712.

The statute contains two important time restrictions: one, that the District by the Department of Finance and

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[9] See also *Sq. 254 Limited Partnership, et al. v. District of Columbia*, (Tax Docket 3313-83, D.C. Super.Ct., Order granting Petitioner's Motion for Summary Judgment, May 15, 1975, Barnes, J., D.C. Super.Ct.; *L'Enfant Plaza*, Tax Docket 2462, *supra; 15th and L Street Associates v. District of Columbia*, Tax Docket 2471, *supra; 1899 L Street Associates v. D.C.*, Tax Docket 2823, *supra; D.C.R.L.A. and L'Enfant Plaza, etc. v. D.C.*, Docket 2518, Memorandum Opinion dated April 27, 1979, Penn, J., D.C. Super. Ct., 107 Wash.D.L.Rptr. 949; *D.C.R.L.A., et al. v. D.C.*, Opinion and Order December 10, 1976, Tax Dockets 2369, 2375, 2370 and 2374; Penn, J., D.C. Super.Ct.; *D.C.R.L.A. and Bresler & Reiner, Inc. v. D.C.*, Tax Dockets 2515 and 2516, Memorandum Order (granting Petitioner's Motion for Summary Judgment), Penn, Jr., D.C. Super.Ct., March 29, 1979; *D.C.R.L.A. and Trilon Plaza Co. v. D.C.*, Tax Docket 2513, Consent Order on Petitioners' Motion for Summary Judgment, Penn, J., D.C. Super.Ct., January 7, 1980; *15th and L Street Associates, et al. v. D.C.*, Tax Docket 2511, Consent Order, Penn, J., D.C. Super.Ct., November 28, 1980; *D.C.R.L.A., et al. v. D.C.*, Tax Dockets 2447, 2449 and 2452, Penn, J., D.C. Super.Ct., October 30, 1978 Opinion, 106 Wash.D.L.Rptr. 2257; *D.C.R.L.A. and Trilon Plaza Co. v. D.C.*, Tax Docket 2451, Order granting Petitioners' Motion for Summary Judgment, November 28, 1979, Penn, J., D.C. Super.Ct.

Revenue (formerly by the Board of Assistant Assessors) must act "*at once*" when it "*learns*" that "*a property*" has been omitted; secondly, an omitted property assessment can apply only for the *three previous years.*

The trial court wrongly concluded in its opinion, footnote 3 (R. 288) and again in the order denying reconsideration (R. 344) that the assessments were timely. The court completely ignored the first timeliness requirement to act, *at once* and then found there is a "three year statute of limitation" which begins to run from the date that the property escaped taxation, and the court without reference to any of the evidence came up with January 1, 1979 (the valuation date for Tax Year 1980) as the earliest date ". . . on which the property *may be said* to have escaped tax liability" and concluded the letter claiming an omitted property assessment was sent and received within three years and therefore was timely. (*Id.*)

The court's application of the timeliness requirements has been created out of thin air with no relationship to the statute or the facts. It is quite true that neither the taxpayer nor the courts have any promulgated rules or regulations as standards for "at once" actions. It is equally true, however, that by no stretch of the imagination can "at once" mean October and November, 1981 when the District, i.e., the Department of Finance and Revenue, admittedly "learned" of the improvements, using the court's terminology, in February, 1977 and recognized, acknowledged, considered, and used what it had "learned" continuously thereafter on every statutorily authorized assessment date. Quite simply, the District never "forgot" what it had "learned".

The District learned nothing in October/November, 1981 that it hadn't known in 1977 and on January 1, 1978, July 1, 1978, January 1, 1979, July 1, 1979, January 1, 1980, July 1, 1980, and on into January 1, 1981 (the valuation date for Tax Year 1982) and particularly on June 24, 1981

when it made the annual supplemental assessment for Tax Year 1982. There is no shred of evidence that the District learned anything in the fall of 1981 that could arguably relate to an omitted property. Notwithstanding the taxpayer's contention that the property had never been omitted either from assessment or taxation, nothing can contradict the District's own records that if there had been an omission, the District learned of it no later than June, 1978 when the property was inspected and the District made the entry in the assessment record that construction was in progress. Yet it was not until October, 1981, the date the District says it acted, and more than three years later than the date the District made the first notation of physical construction, that the District purported to act.

The trial court failed to focus at all on the "at once" requirement and ignored this plain and clear mandatory language. Instead, the court chose a date of January 1, 1979 as the date the improvements *could be said* to have been omitted and then determined that the District acted within three years of that date. This conclusion, not supported by the evidence, is not the analysis required by the statute. If the District learns that a property has been omitted, it must act at once to assess and tax and it can assess for the three previous tax years and no more if a property had indeed been omitted for the three previous years. The three year limitation does not create any right to assess. It clearly establishes only that an owner is liable for a lawful omitted property assessment for no more than three years prior to the tax year when the Department learns of such omission and acts at once to assess and tax.

The trial court misconstrues the statute as a three year period for the District to assess running from the date of the omission from assessment and taxation. If, however, the earliest date of omission was January 1, 1979 as stated by the court, and since that date is a statutory date for a second-half supplemental assessment, then the last omit-

ted year was the year ending June 30, 1979 and the limitation applies to the three years of tax years 1978, 1977 and 1976, not the subsequent tax years 1980 and 1981 or any other years. Even assuming that the date chosen by the court of January 1, 1979 and considering it only as the valuation date for Tax Year 1980, as the court did, the only previous years open under the statute were tax years 1979, 1978 and 1977.

Under none of those alternatives can the court's conclusions be upheld. There is no support for an interpretation that the Department has three years to act *after* knowledge of an omission.

Consider also what the District did in June, 1981. On June 24, 1981 an annual supplemental assessment for Tax Year 1982 was prepared. Assuming for this argument that the District learned of the improvements for the first time in June, 1981, during Tax Year 1981, an impossible assumption given the record, it arguably then had the right to assess for three previous tax years, i.e., the years ended June 30, 1980, 1979 and 1978. But that is not what the District did. It did not purport to act to areas the "omission" until some months later so that Tax Year 1981, ending June 30, 1980, became a previous year.

The two-part limitation on valid actions under the omitted property statute is completely meaningless under the lower court's conclusions. The clear and unambiguous statutory language requires the District by the Department to act as soon as it learns of an omission and then assess for three previous years (if of course the omission goes back that far). Under the opinion and order below the District can elect virtually at any time to use the power of an omitted property assessment regardless of the statutory requirements and the District's own written records. Such a result directly contradicts the required strict construction of taxing statutes as discussed above and the numerous cases cited above where this very same taxing

authority has been barred from similar arbitrary and discretionary actions.

To repeat, the District learned absolutely nothing in October, 1981 that it had not known and used for years and it did not take immediate action when it arguably learned of the improvements for the first time. The assessments, at a minimum, did not comply with the two faced timeliness requirements plainly set forth in the statutes.

III. THE TRIAL COURT FAILED TO CONSIDER AND DETERMINE SUBSTANTIAL ARGUMENTS.

A. The Court Failed to Determine the Taxpayer's Claims Under the Constitution

The trial court erroneously concluded that no determination was necessary on the taxpayer's claims of denial of due process and equal protection of the laws (n. 3, R. 288). This conclusion violates and misapplies a basic principle of judicial review. A court should decline to determine constitutional issues only where those issues would be resolved on the merits in favor of the party whose other nonconstitutional claims result in a favorable disposition of the case. *Elgin, J. & E. Ry. Co. v. Bartley*, 325 U.S. 711, 720, 65 S.Ct. 1282, 1288 (1945). That was not the situation as decided by the court below. In this case the court could have justified the failure to reach the taxpayer's constitutional claims if the court had found the assessments illegal on any one of the numerous nonconstitutional grounds. Instead, the court ruled that the assessments were legal under the court's view of the statute and that the constitutional claims did not have to be considered.

The taxpayer's constitutional claims have obvious merit. As fully documented by the record, this taxpayer and only this taxpayer was singled out to receive assessments for an omitted property.

This taxpayer and only this taxpayer's property was the topic of written memoranda detailing the efforts of the

Department of Finance and Revenue under the direction of the Office of the Corporation Counsel to assert, assess and tax this property as omitted. Although the District could not identify all of the other properties (at least six) which had received annual supplemental assessments in the late summer of 1981 and which were subsequently withdrawn or cancelled by the District as illegally entered, the evidence of the existence of any one other property which received dissimilar treatment, standing alone, requires constitutional inquiry and reversal. The admission that none of these other properties were documented in any way and none were the subject of written memoranda is further evidence of unequal treatment.

This taxpayer was singled out and was the only one to receive such special treatment and this discriminatory treatment is unconstitutional. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886).

Equal protection of the laws under the due process clause of the Fifth Amendment to the Constitution of the United States applies to the residents and taxpayers of the District of Columbia and requires equal treatment of all persons similarly situated. *Neild v. District of Columbia*, 71 U.S.App.D.C. 306, 110 F.2d 246 (1940); *Lappin v. District of Columbia*, 22 App.D.C. 68 (D.C.Cir. 1903); *Weinberger .v Weisenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954).

Taxpayer's motion for reconsideration (R. 289) called all of this to the trial court's attention. In the order denying reconsideration and rehearing, the court again refused to consider the constitutional claims when the court stated it recognized that equal treatment is vital to *equitable* administration of taxing statutes but grounds the decision on concluding that the assessments result in the taxpayer paying its *equitable* taxes (R. 344). It is significant that the court also goes back to the perceived equities in favor of

the District. Under the trial court's view no taxpayer could ever be denied equal protection of the laws because this announced pronouncement is that even if treatment is unequal, equity requires upholding the taxing authority.

It is however fundamental under our constitutional system that taxpayers who are in the same class cannot be subjected to unequal taxation no matter how the unequal treatment is supposedly justified. The courts in this jurisdiction have previously had no difficulty in correctly holding that the constitutionally guaranteed right to equal treatment and due process cannot be ignored by the simplistic argument that the taxing authority is trying to collect taxes. *District of Columbia v. Green*, 348 A.2d 305 (D.C. 1973) and *Kelly v. District of Columbia*, 102 Wash.D.L.Rptr. 2081, October 21, 1974 (Tax Docket 2225) (*Kelly I*); 105 Wash.D.L.Rptr. 577, April 5, 1977 (Tax Docket 2225) (*Kelly II*).

The taxpayer here was the only one of at least six owners who received annual supplemental assessments, all of which the District says were untimely and later withdrawn, to receive the individualized treatment of an omitted property assessment in place of the withdrawn assessment. It is axiomatic that this taxpayer was not treated equally. The guarantee of equal protection guards against such unequal treatment which selects one taxpayer for discriminatory treatment by imposing taxes not imposed on all other similarly situated. The failure to administer the tax provisions equally to all taxpayers similarly situated violates the Constitution. *Green, supra; Kelly I* and *Kelly II, supra; Hillsborough Twp. Somerset County, N.J. v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1946); *In re Chicago Rys. Co.*, 175 F.2d 282 (7th Cir. 1949), *cert. denied*, 338 U.S. 850, 70 S.Ct. 94 (1949); *Delaware, L.S.W. Ry. Co. v. Kingsley*, 189 F.Supp. 39 (D.N.J. 1960).

A separate denial of due process approved by the lower court flows from the District's failure to perform its prom-

ise that the taxpayer would receive a corrected tax bill, as did all other taxpayers in the identical situation. When the District promised that the annual supplemental assessment would be withdrawn, that no administrative appeal was necessary and that a corrected tax bill would be sent, the taxpayer relied on the promise to its detriment. In reliance on the District's promise, the taxpayer did not file an administrative appeal and fully performed as the District wanted.[10] Instead of performing its promise, the District without even informing the taxpayer of its intention to break its promise, proceeded to other action requiring the taxpayer to pay additional taxes for earlier tax years and undertake this litigation. If the taxpayer had appealed the annual supplemental assessment at that time and even if court litigation had been necessary, the issue to be determined would have been solely the illegality of that annual supplemental assessment. Instead, the District's actions caused the taxpayer to relinquish that right and the entire record and consequences of this intentional breach by the District was completely ignored by the trial court.

At a minimum, the District's breach of a promise to which the taxpayer had agreed in good faith, without notice to the taxpayer, is a denial of the taxpayer's rights to due process in its dealings wit the taxing authority.

B. The Assessments, if Made at all, Were Impermissibly Made at the Direction of the Office of the Corporation Counsel Contrary to Law

As an initial point in the discussion, it must be noted that no omitted property assessments were ever made in fact by the Department of Finance and Revenue. It is known that the assessment record card did not reflect any such assessments in October, 1981, the purported date, or

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[10] The omitted property statute does not require or permit an administrative appeal to the Board.

in November, 1981 when the taxpayer received a letter and tax bills claiming such assessments. It is also known that during discovery in this litigation, the District caused the assessment record card to be altered some nine months after the fact and even then the entries were inconsistent with what the taxpayer was told. There can be no credibility attributed to what the District now says it did at any time from 1977 on given its botched attempts to fabricate some record support for their actions.

It is also known that the head of the Tax Division of the Office of the Corporation Counsel directed that the specific treatment of omitted property assessments be imposed on this taxpayer. As with the several other statutory requirements clear on the face of the statute discussed throughout the above sections, and contrary to the trial court's conclusions, it is specifically and only the Department of Finance and Revenue (formerly the Board of Assistant Assessors) which is charged with the authority to determine to assess under the omitted property statute and no one else is authorized to make that decision. This is precisely why the court had to go no farther in *Trustees of St. Paul's, supra,* to invalidate the assessment challenged there. In *Trustees of St. Paul,* the decision to assess as an omitted property was made at the direction of the District Commissioner and not by the statutorily empowered assessors and the assessment was voided.

Here, although the trial court erroneously barred the taxpayer from having either discovery or testimony of Mr. Aguglia, a principal actor in the events, the written record and the testimony establish that but for the instructions from Mr. Aguglia there would not have been any omitted property assessments.

The trial court has erroneously accepted the District's characterization of Mr. Aguglia's role as that of only giving legal advice. Although it may sometimes be difficult to keep separate an attorney's role as a lawyer and the role

of an actor in the events, there is no such difficulty here. Mr. Aguglia directed that the District subject this taxpayer to omitted property assessments and that decision does not rest with him under the statute.

It is arguably apparent that the Department wanted someone else to make the decision; but, if the Department were so sure that it had just discovered an omitted property the subsequent seeking of legal advice was clearly superfluous. The taxpayer cannot speculate what motivated the District's request that Mr. Aguglia decide what to do next with respect to this taxpayer. The record shows that Mr. Aguglia was not brought into determinations on the fates of other identical situations at the same time. For this property and this taxpayer, Mr. Aguglia made the omitted property determination and he was not empowered to do this under the statute.

C. The Trial Court was not Entitled to Ignore the Self-Evident Facts that the Assessments of the Total Property were Increased During the Period that the Assessor was Aware of the Building Progress

The assessor first became officially aware of the building in February, 1977 when the taxpayer was issued a building permit and plans for the improvements were submitted to the assessor.

In December 1977, the assessor inspected the property and saw the work in progress.

The offending §47-831 (formerly §47-712) assessment was made illegally on November 12, 1981 when the taxpayer received a letter and some tax bills claiming omitted property assessments.

In between, the following took place that is not accounted for by the lower court's rulings.

1. For Tax Year 1979, as of January 1, 1978 the assessment of the property was increased from $1,444,130 to $3,588,715.

2. For Tax Year 1980, as of January 1, 1979, the assessment of the property was increased from $3,588,715 to $4,715,100.

3. For Tax Year 1981, as of January 1, 1980, the assessment of the property was increased from $4,715,100 to $5,762,900.

As is obvious, it is clear that the increase in three years to $5,672,900 (or about $3 million) can only to the logical mind be accounted for by the steady addition of improvements to the property during the time in question.

The fact that it was not visibly allocated to building on the assessment notice is not of as much significance to the taxpayer as the increase in taxes which were paid.

It is at least unarguably true that the taxpayer is entitled to the inference from the facts of these three successive assessment increases that the improvements (during building) caused the increase and that the "property" was assessed and taxed during the period.

Throughout the opinion and order, the trial court made certain inferences against the taxpayer which had sinister implications as the court erroneously viewed the law and the evidence. At a minimum, the court was not entitled to ignore the obvious references from the steadily increasing assessments over the relevant time period that the entire property was assessed and taxed.

IV. THE TAXPAYER IS ENTITLED TO AN AWARD OF ATTORNEYS FEES AND INTEREST AT MARKET RATES

The taxpayer is entitled to an award of attorneys fees under the "bad faith" exception to the "American Rule" on awards of attorneys fees as expressed in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975) and *Trilon Plaza Co. v. Allstate Leasing Corp.,* 399 A.2d 34 (D.C. 1979). A litigant is entitled to an award of attorneys

fees when the party-opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." *Hall v. Cole,* 412 U.S. 1, 5 (1973); *Trilon Plaza Co., supra* at 37; *1901 Wyoming Avenue Cooperative Ass'n. v. Lee,* 345 A.2d 456, 464-65 n.2 (D.C., 1975). The District of Columbia may not engage in clearly illegal conduct and with impunity force the injured party to seek his remedy in Court. *Dillard v. Yeldell,* 334 A.2d 578 (D.C., 1975). Based on the record in this case, the flagrant and multiple illegal actions by the District of Columbia warrant an award of attorney fees. Specifically, the District of Columbia's breach of its promise to restore the annual assessment for Tax Year 1982, the promise induced the taxpayer not to appeal the annual supplemental assessment which initiated the events leading to this action, then purporting to take "omitted" property assessments for the earlier years thereby forcing the taxpayer to litigate the illegality of the District's actions while at the same time the District had restored the annual assessments of other similarly situated taxpayers constitutes the willful and wanton behavior which the "bad faith" exception is intended to redress. The District also exhibited bad faith in the conduct of this litigation when it continued to force the taxpayer to litigate after pretrial proceedings and discovery established that the Office of the Corporation Counsel and not the Department of Finance and Revenue directed that the "omitted" property assessments be made, that the assessment record card was changed nine months after the purported "omitted" property assessments to attempt to reflect the assessment alleged to have been made in October, 1981 and that the District made purported "omitted" property assessments only with respect to this property and did not take any such action with respect to other similarly situated properties. For these reasons, the taxpayer is entitled to an award of attorneys fees.

The taxpayer also requests that the court award compound interest on the refunds at market rates rather than

the 6% interest provided by statute, D.C. Code §47-3310(C) (1981 ed.). A similar statute has been found to be "precatory and not mandatory." *District of Columbia v. All of Parcel 137/216 in Square 3623, etc.*, Sup.Ct. D.C., C.A. No. 10242-73, November 29, 1981, Block, J., 109 Wash.D.L.Rptr. 2581 (1981). The facts and circumstances of this case require that adequate relief for the harm from the wrongful assessments wrongfully depriving the taxpayer of its funds must include compound interest at market rate.

V. CONCLUSION

The trial court's opinion and orders are contrary to law and unsupported by the evidence and should be reversed. *District of Columbia v. National Bank of Washington*, 431 A.2d 1 (D.C. 1981).

The taxpayer has demonstrated that the assessments were illegal and unconstitutional. The clear language of the statute and the uncontraverted evidence are conclusive that the property had been previously assessed and taxed and could not be subjected to retroactive assessment. There is nothing ambiguous in the statute; but if there were, any judicial construction of the statute must be to the benefit of the taxpayer. There is no such thing as equitable considerations in favor of the taxing authority. The taxpayer received unequal treatment and its rights to due process were denied.

Assuming *arguendo* that a retroactive "omitted property" assessment could be authorized, the subject assessments were untimely, were not determined by the legally empowered agent and were otherwise not in accordance with the law.

For all of the foregoing reasons, taxpayer respectfully requests that the orders of the trial court be reversed, that the assessments for Tax Years 1980 and 1981 be restored to their annual assessments and that the addi-

tional taxes paid be refunded to the taxpayer with interest at market rates with an award of attorney fees.

Respectfully submitted,

GILBERT HAHN, JR., ESQ.
AMRAM AND HAHN, P.C.
Suite 1100 1155 15th Street, N. W.
Washington, D. C. 20005
(202) 783-3344
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for the Appellant was mailed, postage prepaid, this 4th day of June, 1985 to Richard G. Amato, Esq., Assistant Corporation Counsel, Room 253, 1133 North Capitol Street, N. E., Washington, D. C. 20002 and Charles L. Reischal, Esq., Assistant Corporation Counsel, District Building, 14th and E Streets, N. W., Washington, D. C. 20004.

/s/GILBERT HAHN, JR., ESQ.
GILBERT HAHN, JR., ESQ.

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

1111 19TH STREET ASSOCIATES
Appellant

v.

Appeal No. 85-56

DISTRICT OF COLUMBIA
Appellee

REC'D MAR 31 1987

PETITION FOR REHEARING OR REHEARING EN BANC

GILBERT HAHN, JR., ESQ.
JAMES J. GROSS, ESQ.
AMRAM AND HAHN, P.C.
Suite 1100
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 783-3344
Counsel for Appellant

I. INTRODUCTION

Appellant 1111 19th Street Associates (hereinafter "Taxpayer") moves this Court for a rehearing or a rehearing en banc under the rules of this Court.

Taxpayer asserts that the two grounds for rehearing, (1) uniformity of decision and (2) questions of exceptional importance, as well as Constitutional questions, are involved in this case.

II. ARGUMENT

A. Questions of Exceptional Importance Exist Regarding the Statute of Limitations Issue, Statutory Ambiguity and Legal Interpretation of the Florida Cases.

1. The Statute of Limitations Precludes an Omitted Property Assessment for Tax Years 1980 and 1981

This Court, as did the Trial Court, took the position that the three year period of limitation started on January 1, 1979. Because the Tax Year 1980 annual assessment issued in March, 1980 was the first assessment showing improvements as zero and the omitted property assessment was dated October, 1981, it came within three years of that date.[1]

In fact, the Tax Year 1979 assessment, with the valuation date of January 1, 1978, also showed improvements

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[1] Taxpayer disagrees with both the Trial Court and this Court's interpretation of the period of time within which the Assessor must act. (See Footnote 25 of the slip opinion.) Taxpayer believes that D.C. Code §47-831 calls for action when anyone in the Department of Finance and Revenue "shall learn" and could only apply to years before Tax Year 1978, which is when the District "learned" of the improvements. This statute was never intended for more than the omission of property from the assessment roll. However, for the purpose of this part of the argument, Taxpayer assumes the reasoning adopted by the Trial Court and this Court.

as zero. Thus the October, 1981, omitted property "assessment" was more than three years later and therefore out of time.

During the period which included both January 1, 1978, the valuation date for Tax Year 1979 and March, 1978, the month when assessments for the period July 1, 1977 to June 30, 1978 are issued, there were in fact improvements on the property.

On page 17 (slip opinion) the Court makes a statement which is not true, not supported in the record, and indeed contradicted in its own opinion:

> Hence, one would naturally expect the Department to have documented zero valuation for the tax years in question in one of the two ways it did for tax year 1978 when the building truly had no value because construction on it had not yet commenced.

At Footnote No. 2 of the opinion, this Court states that it relied on the evidence as found by the Trial Court. Nowhere in the Trial Court's recital is there a finding that there were no improvements or no value of the improvements or no construction commencing during Tax Year 1978. For example, the Trial Court stated that petitioner was specifically informed that the Department had 'concluded that the improvements to the property have never been assessed *since construction began in 1977.*' [emphasis supplied] (see pages 7-8 slip opinion)

And nowhere in the Trial Court's recital is there any specific refutation of this. The Trial Court found inferentially that construction had indeed commenced before Tax Year 1978. See page 3, slip opinion of this Court:

> ...the Department's assessment record file included notations that building plans were submitted February 7, 1977, the property was inspected December 17, 1977...

Thus, as of January 1, 1978, the Department was in the same position as it was on January 1, 1979 (as described in Footnote 25), i.e. January 1, 1978 was the date the property escaped taxation. The record below does not dispute this. Nor does the record below sustain this Court's statement that on January 1, 1978, "the building truly had no value because construction on it had not yet commenced."

Based on Footnote No. 25, therefore, since Tax Year 1978 was the date the property escaped taxation, on October 19, 1981, the omitted property assessment would have been beyond the three year period.

2. **The Omitted Property Statute is Ambiguous and the Ambiguity Must be Construed in Favor of Taxpayer**

On page 22 (slip opinion) the Panel correctly recites the argument advanced by Taxpayer and thereafter fails to deal with it. There is no doubt of this ambiguity. The Trial Court admitted that the statute was ambiguous:

> From this wording, two interregations are possible.
> (R. 279)

The District of Columbia in its brief also concedes that the statute is ambiguous:

> ...the Court conceded that, in isolation, Sec. 47-712 might be read as not applying to the facts of this case...Brief for District of Columbia, p. 2.

This Court itself admitted the ambiguity, first reciting the Trial Court's admission of ambiguity (slip opinion pages 18, 19, 20 and 21) then conceding that the language is susceptible of two meanings.

The Court avoids this issue by never answering the question—referring instead to the fact that it was clear that the Department had left out any value under improve-

ments, etc. (see page 15 slip opinion). None of this resolves the ambiguity in the statute.

3. The Opinion of this Court is Erroneous in its Interpretation of Florida Law

It is not clear why this Court has chosen to follow *Korash v. Mills*, 263 So.2d 579 (Fla. 1972), an exception to Florida law, instead of either District of Columbia law or the vast majority of the other courts in the Country.

First, the Florida statute bears no similarity to the District of Columbia statute. While this panel cobbled together a "presumption" from different sections of the Code which were not in existence when the omitted property statute was passed, requiring division into land and building upon notice to taxpayer, this panel cannot avoid the fact that the two omitted property statutes are decidedly different.

The Florida statutes specifcally allow assessment as omitted property of land separately and building separately; the District of Columbia statute does not.

Markham v. Friedland, 245 So.2d 645 (Fla. Dist. Ct. App. 1971) is the law of Florida and the law in every other state which has decided the issue. *Korash* is merely a special exception to the Markham rule.[2]

The *Markham* rule, as followed in Florida, and every other state, is the universal rule—and is the same in *Hunt v. District of Columbia*, 71 App. D.C. 143, 108 F.2d 10 (1939) is stated as follows at 245 So.2d at 648.

> The sole question is whether a successor tax assessor can back assess real property as improved land after his predecessor has determined that real property should be taxed as unimproved land

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[2] With due respect, it is Footnote 21 of the panel's opinion (not Appellant) that is mistaken in stating that *Korash* is the law of Florida on this issue.

> and after the certified assessed real estate tax has been fully paid. This raises a question of law which may be decided on motion for summary judgment.
>
> Once the Tax Assessor has certified the tax roll and the tax levied thereon paid on particular described property, said property cannot again be taxed for that particular year. *Okeelanta Sugar Refinery, Inc. v. Maxwell,* Fla.App. 1966, 183 So.2d 567, 568.
>
> Back taxing of property by an Assessor pursuant to Florida Statutes, Section 193.23 [F.S.A.] is only allowed as to property which has escaped taxation.
>
> It is elementary that in Florida improvements are material to "valuation" but are not a separate category for taxation. Florida Statutes, Section 192.02 [F.S.A.] Accordingly, improved land, taxed as unimproved land, has not escaped taxation and is not the same as 'omitted property'. Attorney General Opinions 068-84, 064-139, 84 C.J.S., Taxation, Section 508, page 959. *Tradewell Stores, Inc. v. Snokomish* [Snohomish] *County,* [69 Wash.2d 352] Wash. 1966, 418 P.2d 466; *Palmer v. Beadle County,* S.D. 1944, [70 S.D. 99] 15 N.W. 246; *Hunt v. District of Columbia,* C.A.D.C. 1939 [71 App. D.C. 143] 108 F.2d 10, 12.

Not only has *Markham* never been reversed, the Court in *Korash* was at great pains to point out that the circumstances in *Korash* were a special exception to *Markham* and *Markham* still remains the law of Florida.

The special circumstances in *Korash* were that the "assessment" of the building was "*lost on a separate card in 1967*", 263 So.2d at 581 [emphasis supplied].

All this amounts to is that when the data identifying the improvements are actually *lost,* then the *Korash* exception shall apply. This is no different than this Court's ruling in *1776 K Street Associates et al. v. District of Columbia,* 466 A.2d 1113 (D.C. 1982), involving the correction of a mistake.

Petitioner's Trial Exhibit No. 4 (part of trial record and record in this Court), Permit Card, Department of Finance and Revenue, Assessment Services Division states as follows:

> Square 140, Lot 90; House No. 1111 19th Street, N.W.; Permit No. B 254425; Des. of Imps New Bldg; ADD FIN $15,113,900 1 1/2 82; Stories 100% complete 6/24/81 P.S. Imps never got in system.
>
> Cu. ft. sny inspected 12-17-77; Estimated Cost SNY JCC; Assessed SNY 6-20-78 MLS under construction, SNY under construction 11-20-78 MLS, 6-15-79 50% completed JZ, 100% Complete MLS 5-2-80

Unlike *Korash* none of this information was *lost.* Each decision made in 1977, 1978, 1979, 1980 and June 24, 1981, represented a judgment, exactly as under *Hunt* and *Korash.* Not only was the data not *lost* but "judgment [was] exercised" every year from 1977 to 1980. Not only that, but in 1981, June 24, 1981, it was clear that an improvement assessment was made and the assessor elected not to put it in the system. The reason for this was never explained. But, *very clearly,* the data was not "lost on a separate card".

As Footnote No. 21 points out, *Korash* was cited in two subsequent Florida cases. Just because *Korash* was cited doesn't mean anything. *Straughn v. Thompson,* 354 So.2d 948 (Fla. Dist. Ct. App. 1978) had actually nothing to do with either *Markham* or *Korash. Straughn* is exactly two

paragraphs long and cites *Korash* for the *correction of a computer error. See 1776 K Street, supra.* This is nothing to do with an omitted property even though the language says that the tax bill "*omitted a zero*".

The other case, *Underhill v. Edwards*, 400 So.2d 129 (Fla. Dist. Ct. App.), cert. denied, 411 So.2d 381 (Fla. 1981), cites both *Markham* and *Korash*, actually precluding assessment for any prior year. In fact *Markham* is cited again for the proposition:

> Once the tax roll has been certified for a given tax year and the tax levied thereon is paid for a particular described property, that property cannot be taxed again for that particular year. 400 So.2d at 132

However, one year was allowed to be taxed because it was exempted from tax and the exemption was in error. Our statute, D.C. Code, §47-831, specifically provides for this. See also *Grosvenor v. Supervisor of Assessments of Montgomery County*, 271 Md. 232, 315 A.2d 758 (1974).

When we said that *Korash* is not the law of Florida, we are correct. *Markham* is the law. And, *Korash* has been applied in three limited circumstances that don't exist in our case.

1. The sheet with the tax data on it was lost (*Korash*).
2. A computer error (*Straughn*).
3. An incorrect charitable exemption (*Underhill*).

We can go a step further to show that *Korash* has had no effect outside of Florida. Footnote No. 22 is in error. That footnote failed to mention that in the two cases cited by the panel and a third case in the line, not mentioned, the taxing authority was overturned.

These three cases are: *Oakland v. Bilyeu*, 359 N.W.2d 412 (Iowa 1984); *Evans Product Co. v. Missoula County*,

201 Mont. 377, 654 P.2d 523 (1982) and *In re Westward Look Development Corp., Inc.*, 138 Ariz. 88, 673 P.2d 26 (1983).

In *Oakland,* the assessor omitted increases on the building, and an omitted property tax was not allowed. While saying that its conclusion was consistent with *Korash,* the Court, in fact ruled exactly the opposite of *Korash* and refused an omitted assessment.

In *Evans,* the error arose because a keypuncher failed to multiply the assessed value by 2.5. *Korash* is cited merely because it was argued by one of the parties, but its facts support our position that the assessor made a judgment each year not to add the improvements to the assessment.

Finally, in *Westward Look* which taxpayers won, *Korash* is cited as part of the Attorney General's argument that the property was "escaped property". The Court rejected the Attorney General's opinion.

In summary, *Korash* has never been followed in Florida or in any other state contrary to the proposition in *Markham, supra* at 648, as in *Hunt v. District of Columbia,* 108 F.2d at 12, that:

> Once the Tax Assessor has certified the tax roll and the tax levied thereon paid on a particular described property, said property cannot be taxed for that particular year.
>
> It is elementary that in Florida improvements are material to valuation but are not a separate category for taxation ... Accordingly, improved land, taxed as unimproved land has not escaped taxation and is not the same as omitted property.

Korash itself only stands for the unusual case where the assessment record card was lost. This is not a traditional "escaped property" situation. It is followed in Flor-

ida only in the case of a computer error and an erroneous charitable exemption. It has never been followed in any other state.

B. The Decision of This Court is Not in Uniformity with Prior District of Columbia Case Law.

The prior section, about ambiguity, leads us inexorably to the question of uniformity of decision. The Court of Appeal [sic] presumed to use *Hunt* as authority. Taxpayer did not cite this case for the simple reason that it involves personal property, even though the thrust of the opinion supports, by analogy, Taxpayer's position.

However, as long as the Court has cited it, it should not omit, in the interests of uniformity, the last two paragraphs of the opinion:

> In ... , the taxpayer owned improved real estate. The taxing authorities assessed the land for taxation, but omitted to assess the building. The Court stated the question to be—did the auditor have the power to reassess as omitted property real estate which had been assessed and on which taxes had been paid, because the property was undervalued in the years in question by failure of the assessing office to take note of the building—and answered the question in the negative, saying that it was not a case of omitted property but of undervalued property.
>
> Other cases are to the same effect. In this view we are bound to hold that the assessment was irregular and without authority of law ... *Id.*, 108 F.2d at 13-14.

This leaves a non-uniformity of decision which a rehearing or full bench should resolve.

There is also a lack of uniformity with *D.C. RLA and Bresler v. D.C.*, Tax Docket 2290, which the District did

not appeal. By analogy to federal practice, this amounts to a concession by the District and the equal of an appellate ruling, although the Federal practice has never been recognized here.

Although the panel finds a distinction, in the *Bresler* case there was just as clear a case as in this one on the lack of assessment of improvements and of its clear knowledge by the taxpayer.

In *Bresler,* there was, in addition to half of a shopping center, four office buildings on the property. From the record card and, obviously to the taxpayer, the half of a shopping center and two office buildings had been assessed, but two newer buildings had not been assessed. There was not the slightest doubt in the mind of the assessor, the taxpayer or on the permanent record card that this was the case.

A more careful look at *Bresler* and the record in this case will make clear that the distinction made by the Court in Footnote No. 20 is no distinction at all.

Like *Hunt, supra,* this leaves the Court with the lack of two uniform decisions, requiring a re-hearing or a rehearing en banc.

4. The Decision of the Court Creates a Constitutional Discrimination Issue.

This panel has paid much attention to the amount of money involved. However, the Court should decide legal questions whether a penny or a million dollars is involved.

We ask the full Court to examine the underlying reasons for the panel's decision. On page 25 of the slip opinion, the Court apparently attempts to add equities to the justify its decision on the legal issue, begs its readers to consider that the assessor just made a "mistake" and, without citing any support in the Trial Court's findings, *thinks* itself that there was "an error made, not a judgment reached"

and therefore all it took was an "error" of judgment to get the District within the statute.

As if this plea to its readers was not quite satisfying with that, the panel falls back on the "fair sharing of the financial burden of the government" and that (presumably if the legal question is ambiguous) the case is *equitably* justified.

All of this proves better than Taxpayer can that this panel has not consistently applied the Constitution and the uniform decisions of the Supreme Court to this case.

1. *Miller v. Standard Nut*, 284 U.S. 498 (1932): ambiguous statutes should be interpreted in favor of the taxpayer.
2. *Columbia Realty Venture v. D.C.*, D.C. App., 433 F.2d 1075 (1981): all equitable questions in tax cases are intended to favor taxpayer and not the taxing authority.

III. CONCLUSION

The decision of the Court creates a lack of uniformity in District of Columbia case law, leaves unresolved or incorrectly resolves several questions of exceptional importance and creates a Constitutional issue.

WHEREFORE, Appellant requests that this Court grant a rehearing or rehearing en banc, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/James J. Gross
GILBERT HAHN, JR., ESQ.
JAMES J. GROSS. ESQ.
AMRAM AND HAHN, P.C.
Suite 1100
1155 15th Street, N.W.
Washington, D.C. 20005

(202) 783-3344
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing or Rehearing En Banc was mailed, postage prepaid, this 31st day of March, 1987 to Richard G. Amato, Esq., Assistant Corporation Counsel, D.C., Room 238, 1133 North Capitol Street, N.E., Washington, D.C. 20002 and Charles L. Reischal, Esq., Assistant Corporation Counsel, D.C., District Building, 14th and E Streets, N.W., Washington, D.C. 20004.

/s/GILBERT HAHN, JR., ESQ.
GILBERT HAHN, JR., ESQ.

DISTRICT OF COLUMBIA
COURT OF APPEALS

1111 19TH STREET ASSOCIATES
Appellant

v. Appeal No. 85-56

DISTRICT OF COLUMBIA
Appellee

ERRATA TO PETITION FOR REHEARING OR REHEARING EN BANC

Comes now Appellant and, by and through counsel, respectfully submits this Errata to Petition for Rehearing or Rehearing En Banc:

Page 5, paragraph 5, line 3, correct "*Korash*" to "*Markham.*"

Respectfully submitted,

/s/James J. Gross
GILBERT HAHN, JR., ESQ.
JAMES J. GROSS, ESQ.
AMRAM AND HAHN, P.C.
Suite 1100
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 783-3344
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Errata to Petition for Rehearing or Rehearing En Banc and attached Errata to Petition for Rehearing or Rehearing En Banc was mailed, postage prepaid, this 3 day of April, 1987 to Richard G. Amato, Esq., Assistant Corporation Counsel, D.C., Room 535, 1133 North Capitol Street, N.E., Washington, D.C. 20002 and Charles L. Reischal,

Esq., Assistant Corporation Counsel, D.C., Room 308, District Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

/s/Illegible Name
GILBERT HAHN, JR., ESQ.